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# NORTH CAROLINA REPORTS.

VOL. 8.

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REPORTS OF CASES ARGUED AND ADJUDGED

IN THE

# SUPREME COURT

## OF NORTH CAROLINA,

DURING THE YEARS 1820 AND 1821.

---


THE FORMER PART BY

THOMAS RUFFIN, Esq.,

THE LATTER BY

FRANCIS L. HAWKS.


(VOL. I.)

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# PREFACE.

The cases reported in this volume were prepared in part by the former reporter: the result of Mr. Ruffin's labors will be found in the first 248 pages of the book. The residue of the volume is by the present Reporter; and prepared as it was under many disadvantages, he is aware that it is not exempt from imperfections. Few of the arguments were heard by him, as they were made at a period when it was not his duty to report them; and with all the assistance which has been kindly afforded him by the gentlemen of the bar in furnishing their notes, he has yet to regret, that in many instances briefs were entirely lost, and it was not possible, in others, to learn more of the argument than the name, perhaps, of some solitary case referred to. Anxious, since his appointment, to present as speedily as possible, the unreported decisions of the Court to the profession, he had but little opportunity of revisal before publication. He aimed only at fidelity as a reporter; and he cannot but believe there are defects, which, though now obvious to himself, yet were not so readily perceptible to a mind wearied with almost constant application to the business. With this statement, however, he submits the work to the candor of his brethren, and the object of his ambition will be attained, should it to them be useful. To some it may seem necessary to explain the insertion in the volume of cases apparently unimportant, as involving principles the most common and of the most familiar application: the recollection of the members of the bar will readily furnish an apology; the act under which the reporter is appointed leaves him no discretion, but enjoins the publication of *all* the cases.

NEWBERN, July, 1823.

# JUDGES

OF THE

# SUPREME COURT OF NORTH CAROLINA

DURING THE TIME OF THESE REPORTS.

---

THE HON. JOHN LOUIS TAYLOR, CHIEF JUSTICE.
THE HON. JOHN HALL, JUDGE,
THE HON. LEONARD HENDERSON, JUDGE.

---

The Hon. A. D. Murphey, Judge of the Superior Courts, presided, during June Term, 1820, in several causes, instead of Judge Henderson, who had been concerned in them at the bar.

# REPORTS OF CASES

ARGUED AND ADJUDGED

## IN JUNE TERM, 1820.

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### THE STATE *v.* JAMES DALTON.

*From Rutherford.*

A paper writing, in these words, "*Received of J. D. his book account in full.—J. L.*" is a receipt *for money*, within the act of 1801, c. 6—it being proved, that at the day it bears date, J. D. was indebted to J. L. in a sum of money upon open account. So likewise these words, "*Received the above in full,*" at the foot of an account.

All debts are to be understood as received or paid *in money*, unless explained by some other circumstance.

This was an indictment for forgery, under the act of Assembly passed in 1801, c. 6, and charged that the prisoner forged a certain *acquittance and receipt for money*, in the words and figures following, that is to say, "*September 3d, 1816—Received of James Dalton his book account in full—John Logan,*" with intent to defraud said Logan. It was proved, upon the trial, that on the 3d September, 1816, the prisoner was indebted to Logan in the sum of seven dollars, by book account, for which he was warranted, and judgment obtained before a Justice of the Peace. The prisoner then warranted Logan for the same money, alleging that he had before paid it; and, in proof thereof, he offered the said paper writing in evidence. The jury found the prisoner *guilty;* and he moved for a rule for a new trial, upon the ground that the said paper writing was not an acquittance or receipt *for money*, within the
(4) meaning of the statute, which was refused, and sentence passed on the prisoner, who appealed therefrom to this Court.

The case was submitted without argument.

TAYLOR, Chief Justice, delivered the opinion of the Court:

The sole question is, whether the paper writing which the prisoner has been convicted of forging, is a receipt for money, within the act of 1801, c. 6. The necessary effect of setting up such a paper against Logan, provided it were genuine, was to discharge the prisoner from all such demands of Logan, as come within the denomination of a book account.

To acknowledge the receipt of a book account in full, is equivalent to an acknowledgement, that the amount of the account has been paid. Had the paper omitted the words "*in full*," its meaning would have been equivocal, and it might have been difficult to pronounce, whether Logan had received a book account belonging to Dalton or himself; that is, a book account kept by Dalton against Logan, or payment of an account which Logan exhibited against Dalton. But the language in which it is expressed, leaves no doubt that it purports to be a receipt or acknowledgment of payment on the part of Logan of his account against Dalton. Is it, then, to be understood as a receipt *for money?* An account is a register of facts relating to money, which, when kept in a book, is thence called a book account. Money has become the universal instrument of commerce, by the intervention of which goods of all kinds are bought and sold. Accounts are kept in money; and a creditor may always exact it in preference to any commodity. When debts are paid in money, it is according to the usual mode of business; when they are paid in anything else, it is in consequence of some special agreement of the parties. When one says, he has paid or received a debt, we understand, without further explanation, that he has paid or received it in money. If a creditor put at the foot of an account, "*Received the*
(5) *above in full*," we infer that he has received the money, because the account is so kept It would be doing violence to the import of language, and to our understanding of the settled mode of transacting business, to construe this receipt in any other manner. The law must bear upon the dealings of men, in the way of their daily course and practice; but if this paper be not a receipt for money, then all the purposes of forgery may be successfully accomplished, without incurring the penalty of the crime. A paper shall be available as a receipt for money, because it is so understood by every man who reads it; still, as it omits the word *money*, it does not come within the statute!

We think the conviction is proper, and that the judgment of the law, as prescribed in the act of 1801, c. 6, ought to be passed on the prisoner.

Let that opinion be certified to the Superior Court of Rutherford.

(6) **THE STATE *v* MILES ALLEN.**

*From Ashe.*

A witness, who has never seen a person write, nor received letters from him, and who hath no knowledge of his handwriting, but that derived from having received bank notes in the course of business, which purported to be signed by the person as the president of the bank, and were reputed to be genuine, is incompetent to prove his hand-writing, or to prove that a bank note, purporting to be signed by him, is counterfeit: at least, unless the ordinary occupation of the witness is such as to render it probable that he has received and passed large sums, so as to become a skilful judge, and unless it appear that he has actually passed them so long ago as to allow time for the return of them, if spurious.

The modes of proving hand-writing are, by the evidence of those,

1. Who have seen the person write, which is most certain;
2. Who, in the course of correspondence, have received pertinent answers, or other letters of such a nature, as renders it highly probable that they were written by the person;
3. Who have inspected and become acquainted with ancient authentic documents, which bear the signature of the person.

Adjudged cases have not yet laid down other rules; though new cases may arise that will come within the reason of these.

And hence it seems, that a witness, having no knowledge of the handwriting of a person but that derived from the signatures to the bank notes, who is a banker, and, in that character, has habitually, for several years, received and paid away large sums in such notes, which he believed to be genuine, and were so reputed, is competent to prove that a note, purporting to be a bank note, and to be signed by the same person, was not signed by him, and is counterfeit.

Although sufficient legal evidence be before the jury to justify the verdict, yet if improper testimony be admitted, after objection, a new trial will be ordered; because it cannot be known on which the jury relied.

The prisoner was indicted in the Superior Court of Ashe, for a deceit in fraudulently passing a false and counterfeit bank note, purporting to be issued by the Bank of Augusta, in Georgia, and to be signed by Thomas Cumming, as President, and E. Early, as Cashier, of that bank. Several witnesses were called by the Solicitor, on the trial, to prove that the note was counterfeit. None of them had seen
(7) Cumming or Early write, or had received letters from them; but they all swore, that in the usual course of their business, they had received considerable sums of money in notes of the Bank of Augusta, which had the names of *Cumming* and *Early* signed to them as President and Cashier; that the notes thus received by them were reputed to be genuine, and passed currently as such; that in this way, and this way only, they had acquired a knowledge of the handwriting of *Cumming* and *Early;* and, if the notes received by

them were genuine, that which was then before the Court was counterfeit. Another witness, A. Erwin, proved that he often received, and had seen received in the State Bank at Morganton, large sums in the notes of the Bank of Augusta, which had been paid out again by the bank in the course of business at various times for several years; that the notes thus received were reputed to be good, and that he believed them to be so; and if they were genuine, the note in question was undoubtedly counterfeit, in his opinion. It was objected, on behalf of the prisoner, that such evidence ought not to go to the jury, because none of the witnesses had become acquainted with the hand-writing of *Cumming* or *Early*, by either seeing them write, or in the course of correspondence. But the Court suffered the evidence to go to the jury, and instructed them, that, if they believed the witnesses, they were authorized upon that evidence to consider the note as counterfeit. The jury found the prisoner *guilty;* and he moved for a new trial for misdirection, which was refused, and sentence passed on him, from which he appealed to this Court.

The case was argued by the *Attorney-General*, for the State, and by *Seawell*, for the prisoner.

TAYLOR, Chief-Justice.—The only methods of proving the hand-writing of a person, sanctioned by law, are,

First, by a witness who saw him sign the very paper in dispute;

(8) Secondly, By one who has seen him write, and has thereby fixed a standard in his own mind, by which he ascertains the genuineness of any other writing imputed to him;

Thirdly, By a witness who has received letters from the supposed writer, of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason that the letters, from which the witness has derived his knowledge, were really written by the supposed writer of the paper in question;

Fourthly, When a witness has become acquainted with his manner of signing his name, by inspecting other ancient writings bearing the same signature, and which have been regarded and preserved as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow.

Other modes of proving hand-writing, not yet sanctioned by adjudged cases, may possibly come within the reason of the cases enumerated; but I think they ought to appear clearly to do so, before they are admitted. The Court ought to be well satisfied that the person who proves the signatures on a bank bill, without having seen the signers write, or having been engaged in a correspondence with them, were, from their situation and pursuits, likely to acquire a correct knowledge on the subject; and, particularly, that they must have known of the return of those bills they believed to be genuine, if they had been spurious. The first witnesses in this case only knew that they had received bills in the course of business which purported to be signed by the President and Cashier of the Augusta Bank; that they passed them away, and *if they* were genuine, the note in question was counterfeit. What was the occupation of the witnesses, whether they were likely to receive many bills, and to acquire an accurate knowledge of the signatures, are facts to (9) which no evidence is directed. They may have received counterfeit bills, which may yet return; for it is not said when they received and passed them away. Such evidence, I think, inadmissible, especially as it requires much experience and a more than ordinary skill to detect counterfeit signatures to bank notes. The fraudulent ingenuity of men has brought this crime to such perfection, that even the signers themselves have sometimes been imposed upon. Hence, before witnesses are allowed to give evidence to the jury, the Court ought to be satisfied that they are skilled in the knowledge of bank notes. The evidence of *Erwin* approaches very nearly to my conceptions of what is proper on such a question; and if I were certain that the verdict was founded on his evidence, and not on that of the other witnesses, I should hesitate in agreeing to a new trial. But, as some improper testimony has been admitted, a new trial must be awarded.

HENDERSON, Judge.—The law requires, that he who deposes to a fact, should have the means of knowing it. Grounds of conjecture and opinions are not sufficient. A knowledge, therefore, of the hand writing of a person, should be founded on specimens of writing known to be his. Having *seen* him write, is the most certain. But it is said to satisfy the rule, if the specimens be obtained in the course of a

correspondence in which pertinent answers have been received, or if they be ancient authentic documents. I am not disposed to go further: for there is nothing more dangerous than a relaxation of the rules of evidence. Their object is more to prevent imposition by falsehood, than even to get at the truth—my meaning is, that the law prefers that many truths should be omitted, than that one falsehood should be imposed on the Court. The rules, therefore, guard more against the introduction of falsehood, than against the suppression of the truth. In this case, it is more than probable,
(10) that the bank notes which the witnesses had seen, and from which they had drawn their knowledge of the hand-writing of the president and cashier of the bank were genuine, and, therefore, that the note passed by the prisoner was counterfeit But this rests on bare probabilities; for it might well have happened, that most or all of the notes from which they derived their knowledge, were spurious. We cautiously refrain from giving any opinion upon the doctrines laid down in the case of *The United States* v. *Haltsclaw*.* It does not appear here, what the ordinary business of the witnesses was; how or when they received the notes; at what time they had passed them; or whether they had passed them at all, so as, if spurious, they might be returned upon them. All that those witnesses said, may, therefore, well be true, and yet, the note in question be genuine. It is certainly better, that the prosecutor should be put to the trouble of procuring better testimony, than that a man should be punished in a case where it is quite possible he may be innocent. Many of these observations do not apply to Mr. Erwin: certainly, he had a better opportunity of forming a correct judgment than any of the other witnesses. But even if he was admissible, a new trial should be granted, because we cannot say on whose testimony the jury relied.

Let there be a new trial.

HALL, Judge, concurred.

* 2 Hayw., 379.

## (11) ARMSTRONG AND ARRINGTON *v.* SHORT.

*From Nash.*

It is most proper, that an inquisition should distinctly find the party to be a *lunatic* or an *idiot;* but it will be sufficient if an equivalent description be used—as that he is of *insane mind:*

An inquisition, finding the party "to be incapable of managing his affairs" only, is defective and void.

No person is entitled to a traverse to an inquest of office, in its proper and technical sense, under st. 2 Ed. 6, so as to vacate the office, unless he be interested at the time of finding it.

But such inquest, when offered in evidence, is only presumptive proof against persons not parties or privies.

*Held*, therefore, in debt on bond, given after office found, where an inquisition was pleaded for the defendant, that the plaintiff might in his replication, traverse the truth of it, and, upon the trial, give evidence to verify the replication.

This was an action of debt on an obligation executed by the defendant to the plaintiffs; and on the trial in the Court below, the plaintiffs had been nonsuited, and appealed to this Court. The case, as stated in the record, for the decision of this Court, is as follows: Short was found by inquisition, before the execution of the bond, "to be of insane mind, and incapable of managing his affairs," whereupon the County Court appointed S. Westray his guardian, who, being duly notified to appear and defend this suit, did appear accordingly, and pleaded the inquisition. The plaintiffs replied, and therein confessing that Short was found to be of insane mind, said that Short was not, at the time of executing the obligation, nor of taking the inquest, nor at any other time, *non compos mentis*, but that he had a sound mind and memory, and they traversed the truth of the finding in the said inquisition. The plaintiffs offered evidence to support their replication, which the Court rejected, because the bond declared on had been executed after the inquisition, which being still in force, was conclusive.

(12) The case was argued by Seawell for the plaintiffs, and by Mordecai for the defendant.

*Seawell* insisted that the inquisition was, in itself, defective and void, because it did not, in express terms, find Short to be an *idiot* or a *lunatic:** But at all events, the plaintiffs ought to be allowed to traverse the truth of the finding. It is against the first principles of justice to conclude a person

* Act of Assembly, 1784, c. 15, s. 3.

by *ex parte* proceedings,—and adjudged cases shew, that it is a matter of right to traverse an office found. 2 Atk. 412—5 Ves. jun. 450.

*Mordecai*, for the defendant.—The plaintiffs have acquired their interest since the office found, and, therefore, cannot have a traverse. The acts of a person labouring under mental derangement, cannot prejudice him; because he has not the command of his will, which alone gives efficacy to, and stamps a character upon him. Wherever this want of will can be established, the act is void. But because of the difficulty of proof of the state of a man's mind at particular moments, and to avoid the fraud that would be committed upon such unfortunate persons, should such proof be received, the law has appointed this method by inquisition; and, as long as the finding continues, all persons are concluded from acquiring any interest which the law will protect. If a lunatic be sued on a bond, while the office is in force, a supersedeas may be sent to the Justices.* The right of traverse is given by stat. 2 Ed. 6, which provides "if any shall be untruly found lunatic or idiot, that every person *grieved by such office or inquisition*, shall and may have his traverse to the same, *immediately or after*, at his pleasure." Now the person having the right to traverse, must be such a one as might, *at his pleasure*, do so immediately *or* after. He must be *interested*, otherwise he could not be *grieved*; and he must be interested *at the time*, for otherwise he could not use his pleasure whether to traverse then or after. But per-
( 13 ) sons, who had an interest which was affected by the relation of a finding to a time past, have the right of traverse secured to them, and they may exercise it when they please.†

But even if the plaintiffs be entitled to a traverse, they must go to the Court, into which the inquisition was returned, and there tender it. An issue could then be taken and tried; and if it be found, that the person had been improperly found to be *non compos*, the first verdict would lose its efficacy. But, by the present mode of proceeding, the same man may be found to be sane and insane, according to the capacity of the jury who try the matter, or the capacity of those interested for procuring testimony. A jury of Nash will say he is insane, while one in Halifax will find him to

* 4 Co. 126. † Ch. C. 113.

be sane: and all this takes place, too, while the record of a Court of competent authority shews, that he has been duly pronounced insane. The course in England is, to apply to the Court of Chancery, where the inquisition is returned, and tender a traverse; then an issue is made up and sent to King's Bench.*

TAYLOR, Chief-Justice.—As the Legislature designed that guardians should be appointed for idiots and lunatics, alone, it is highly necessary that the inquisition, upon the authority of which the County Courts exercise the power confided to them, shall distinctly state, that the person is an idiot or lunatic, or, by an equivalent description, present the same meaning. Very mischievous consequences might ensue from a laxity in this respect, since by a jury undertaking to measure the degrees of intellect, persons might be subjected to this guardianship whose free agency the law had not restrained, however wise it might be thought on general reasoning to tie up the hands of spendthrifts and drunkards, as is done in some of the States. An inquisition should, therefore, be regarded as a nullity, which barely found that the party was of such weakness of mind as to be incapa-
(14) ble of managing his own affairs; for this does not import a total privation of understanding, and, consequently, does not meet the legal acceptation of lunacy. The objection taken to this inquisition is, that it uses the terms "*insane mind*," and does not find Short to be a lunatic; but I think those words are of like signification, and do substantially conform to the requisites of the act. "Unsound mind," which has the same meaning, in the law, with insanity, is frequently used in statutes in that sense. Lord Coke translates *non compotes*, "persons of nonsane memory;" and "insanity," both in law and according to the Latin word whence it is derived, imports madness.

It is argued by the appellee, that none can traverse the inquisition but those who had an interest at the time it was found; and, in support of this position, the words of the statute 2 Ed. 6, are cited, and several authorities relied on. In the technical sense of a traverse to an inquest of office, this is certainly correct; for the specific design of passing the statute was for the benefit of such persons as were sometimes deprived

* *Ex parte Wragg*, 5 Ves. 833.

of their rights by untrue findings of offices. Persons holding terms for years were often put out of possession by reason of inquisitions, because such terms for years were not found; after which they had no remedy during the King's possession, either by traverse or *monstrans de droit*, because such interests were not freehold.* Those persons only are entitled to traverse the inquisition; which is done by suing out a *scire facias*, according to the statute. Hence, a person claiming under a deed from a lunatic after the inquisition, was a stranger, and had no right to a traverse. But the true enquiry here is, in what degree shall an inquisition be considered as evidence against a person claiming from a lunatic who is under guardianship. It is possible that a person may be found a lunatic, who is really not so; and very probable that a lunatic may have lucid intervals, in (15) which no one could detect his incompetence. Hence, serious mischiefs might arise to innocent persons, if they were concluded by an office. The rule of law, that no one shall be bound by a proceeding to which he was neither party nor privy, ought not to find an exception in a case where the whole proceeding may be consummated without any notoriety beyond the neighborhood in which it is transacted. The case cited from 2 Atkyns, is an authority to shew that such an inquisition is not conclusive; for the Chancellor heard witnesses to disprove the lunacy found by it, and, on the strength of their testimony, decreed that a purchase made by the supposed lunatic should stand. This shews that the sense in which he used the word traversable was, that it might be contradicted by witnesses. In the case *ex parte* Barnsley,† the Chancellor says, that inquisitions of lunacy are not at all conclusive; for they may bring actions at law, or a bill to set aside conveyances, so that it may be disputed afterwards upon the issue to be directed. In Collinson on idiots and lunatics, it is distinctly laid down that an inquisition is only presumptive evidence of insanity, and not conclusive; so that in an action in respect of any contract or deed, it is for a jury to determine whether, at the time of executing it, the party was *non compos*, though, by the inquisition, he was found to be *non compos* at such period. When, therefore, it is said in Bacon, that if a lunatic contract with another after office found, it is at the peril of him who

* 4 Reeve's Hist. 462. † 3 Atk. 184.

makes the contract with him, it must be understood in reference to the risk he runs in not being able to disprove the inquisition. In such case, he would be concluded; since he would have no right to a traverse under the statute, being a stranger when the office was found. But if he had contracted with a lunatic, who was not found so by office, the defence could not be set up against him, since no man can stultify himself. The reason of the thing, therefore, coincides with the authorities; and the nonsuit must be set
(16) aside and a new trial granted, and the plaintiffs be allowed to offer evidence to verify the replication.

HALL, Judge.—Upon the strength of the case of *Faulder* v. *Silk*, cited 2 Mad. Chan. 578, and that in 2 Atk. 412, as well as some others that might be referred to, I concur in the opinion that the inquisition is only *prima facie* evidence, and that evidence, contradictory, is admissible. If a lunatic, so found by inquisition, afterwards have lucid intervals before such inquisition be superseded, and during such interval enter into a contract, the other party may certainly prove the fact, and have the benefit of it.* The effect of an inquisition is to permit the committee of the lunatic to plead the lunacy, which, without such inquisition, the lunatic himself could not do.

HENDERSON, Judge, having been concerned in this cause at the bar, did not sit; and MURPHEY, Judge, sat for him, and concurred.

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## THE JUSTICES OF WAYNE *v.* ARTHUR CRAWFORD AND OTHERS.

*From Wayne.*

If a party to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that Court.

Since this case came into this Court, Crawford, one of the defendants, died; which Mordecai, for the plaintiffs, now suggested. He then moved for a *scire facias* against his administrator, to make him a party to the suit here.

Which the Court, after consultation, allowed.

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* 1 Fonb. 65, n. x. 3 Bro. C. C. 441.

(17) HARKEY. Adm. of Russ, *v.* POWELL—IN EQUITY.

*From Mecklenburg.*

A mortgage of a slave was made in 1789, to secure a debt due in March, 1793, and the mortgagee took possession at the date of the deed, and continued it until 1815, without any account or acknowledgment.

*Held*, that the mortgagor could not redeem. Such a lapse of time creates the presumption, that the right of redemption has been abandoned.

This was a bill filed in August, 1815, for the redemption of a negro slave, Grace, and her issue, and was transferred from the Court of Equity for Mecklenburg to this Court, for trial.

The bill charged, that complainant's intestate borrowed from Powell, the defendant, the sum of eighty pounds, in the year 1800, and for the purpose of securing the payment of it, executed a bill of sale to Powell for the said slave, subject to a proviso of redemption, on payment of the said sum. That defendant took possession of the slave at the time of making the deed, and had continued it ever since. That she had issue, several children, who were also in his possession. That Russ, in his life time, paid forty pounds, part of the mortgage money. That he then died intestate. That complainant had obtained letters of administration of his estate, and had offered to pay the residue of the said mortgage money and interest, but, at the same time, alleged that it had been already satisfied, out of the hire and profits of the slaves. Complainant then prayed an account, and that he might be let in to redeem.

The defendant admitted, in his answer, that he lent Russ eighty pounds; but it was on the 21st of March, 1789, and that he then took a bill of sale from Russ, conveying to him the slave Grace, with a condition that if the money should be repaid on or before the first day of March, 1793, the deed should be void. That eighty pounds was the full
(18) value of Grace, when he took her in 1789. He denied that Russ or the complainant had ever paid or offered to pay, the eighty pounds, or any part thereof, or had requested him to give up the negroes, or to come to an account. He stated that Grace had issue, six children, which he had raised and then held as his own.

The answer then insisted, that the defendant had been in the peaceable possession of the slaves for more than twenty years after the first day of March, 1793, before suit brought,

and that, as he gave a fair price, this Court would not aid complainant. With his answer, the defendant exhibited the deed; which bore date and was of the tenor as stated in the answer, and in the usual form of mortgages, except that in the conclusion, it contained this clause: "That if the said money was not paid at or before the first day of March, 1793, this deed shall remain in full force and virtue, *as if there had been no condition annexed to it.*" It was proved and registered in May, 1793.

It did not appear by the bill or answer, when Russ died or when complainant administered, though the letters of administration, which were filed among the papers in the suit, bore date in August, 1815. Nor did the bill charge when Russ paid the forty pounds, nor when complainant offered to pay the residue.

Several issues were submitted by the Court to a jury, who found, that in 1789, the sum of eighty pounds was something less than the value of Grace; that at the time of filing the bill, she and her increase were worth greatly more than that sum; that there was no evidence, that Russ or complainant had paid, or offered to pay, any part of the eighty pounds; that Russ did not, in his life time, set up any right to redeem after March, 1793; and that the defendant had held the said slaves adversely, and claiming them as his own property, for twenty-one years, or thereabouts, before suit brought.

*A. Henderson*, for the defendant, relied upon the length of time, and the peaceable possession of the defendant, as a complete bar to the relief sought.

(19) *Wilson*, for the complainant, said that it was clear this was a mortgage, notwithstanding the unusual clause in the deed; and, being so, was redeemable. The time is not a bar in this case. In England, twenty years has been held to prevent redemption; but there are exceptions to that. If the parties treat it as a mortgage, by keeping an account or the like, time does not operate. And, when equity does regard it, it is not like the statute of limitations, which forms a conclusive bar, but is merely a circumstance on which a presumption of abandonment is built. Such presumption may be rebutted by slight circumstances. Fraud always rebuts it; and its efficacy is destroyed, whenever the right of redemption is obscured by the particular phraseology

of the instrument, or an unusual clause in it. Where a deed prescribed that the mortgagor should redeem *with his own money and in his life time*, it was held to be a fraud, because it induced the belief that he had no right to borrow and pay the debt, and his heir conceived that the equity of redemption had been lost by the death of the ancestor.* So, here the intestate had reason to believe, and every common man would have believed that after March, '93, he could not redeem; because the deed expressly stipulates, that, if not done by that time, the contract shall stand absolute, *as though no condition had ever existed.* Such a clause would necessarily mislead him, and was a fraud on him; and, therefore, lapse of time ought not to avail the defendant anything.

Moreover, the rule in England is adopted in analogy to the statute of James, which bars an entry, if not made within twenty years. In conformity thereto, our measure should be three years, and therein correspond with the act of 1715; but this Court has often decided against that position, though no other precise time has been fixed on. This does not seem to be a fit case for a rigid rule or restricted period.

(20) But TAYLOR, *Chief-Justice*, said, that the slave mortgaged was delivered into the possession of the defendant in March, 1789, when the deed was made. By the condition of the deed, the money became payable the 1st March, 1793, from which time to the filing of the bill is a period of twenty-two years and five months. Throughout this long possession, there is no act, no acknowledgment shewn on the part of the defendant, by which the transaction was recognized as a mortgage. The right of redemption must, under these circumstances, be presumed to have been abandoned. The bill must be dismissed.

HALL, Judge, and HENDERSON, Judge, concurred.

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ROBERT GULLY *v.* J. G. GULLY AND WATSON.—IN EQUITY.

*From Wayne.*

The act of 1800, c. 9, does not require a bond of any particular *form* to be given for obtaining an injunction.

The condition of a bond will be so construed by rejecting insensible words, so as to fulfil the intent of the parties.

* 3 Equ. Ca. 601.

GULLEY *v.* GULLEY AND WATSON.

Hence, if a bond given upon obtaining an injunction be conditioned, "if the said R. G. (the complainant) should dissolve the injunction, and pay the sum recovered at law and interest," the words "*should dissolve the injunction, and*" will be rejected as insensible.

It is no objection to such a bond that it is taken for double the amount of the recovery at law: nor that it provides in the condition for the payment of interest on the sum recovered, should the injunction be dissolved.

The defendants here had obtained a judgment at law against the complainant for the sum of twelve hundred and three dollars and twenty cents, besides costs of suit. The complainant then exhibited his bill in equity, and obtained a Judge's *fiat* for an injunction upon his entering (21) into bond with security according to law. The Master took the bond with security in the sum of 2,406 dollars, 40 cents, with condition (reciting the judgment and the order for the injunction) that "if the said Robert should *dissolve* the injunction, and pay into the Clerk and Master's office the said sum of $1,203 20 and interest, then the obligation to be void, otherwise to remain in full force."

Upon the coming in of the answers, the case was heard upon the bill and answers, and a motion to dissolve the injunction, which was done; and then a decree made against the complainant and his surety "on their bond for $2,406 40, the sum mentioned therein, to be discharged by the payment of the judgment at law and all costs." From which decree the complainant appealed to this Court.

And Mordecai now contended for him, that wherever a right is withheld by a public officer until a bond be given, and the bond vary from that prescribed by the statute, it is void.* And that wherever a public officer transcends his authority, his act is not only void for the excess, but is altogether void.† The statute 1800, c. 9, directs the bond to be taken "for the payment into Court of the sum complained of and all costs upon the dissolution of the injunction." The bond does not pursue the statute. The act does not authorize the taking of a bond to *be discharged* on performance of a *collateral act;* but for the payment of the sum complained of and costs. The statute does not authorize the taking a bond for a greater sum than that complained of and costs; this is for *double* that sum,‡ and the penalty cannot he looked upon

* 2 L. Repos. Governor *v.* Meilan. 7 Cranch, 287, United States *v.* Gordon. † Jones *v.* Gibson, No. Ca. T. R. 42. ‡ 7 Cranch, 287.

as mere form ; for the *law* regards it as substance. The penal bond of an infant, for instance, is absolutely void, though payment of the sum attempted to be secured might have been enforced, if secured by a single bill.

(22) But admitting these to be but formal matters, which the Court will therefore overlook, still the condition is essentially defective. The condition is, "if the complainant shall dissolve the injunction, and pay $1,203 20, with interest." Hence, if the injunction be sustained by the Court, the bond is forfeited—if it be dissolved by the Court, it is also forfeited ; and it can only be saved by the complainant's dismissing his bill himself (and thereby dissolving his injunction) and paying the debt and costs. In other words, he can only get rid of the penalty by abandoning his claim to relief. The *statute* does not provide for interest ; but the *officer* compels him to secure the interest, and thereby makes the condition essentially different from that prescribed by the act. Judgments did not bear interest until 1807, which was long after the passage of the act under which this bond was taken. He also said, the decree itself was wrong ; because the condition of the bond is for payment of the debt and *interest* recovered at law, and the decree is for the debt and *all costs.*

*Gaston*, for the defendants.—The objections to the sufficiency of this bond are entitled to no favor, and ought to be strictly considered. But the bond is, in fact, sufficient. The *form* of the injunction bond is not prescribed by the statute; and the act 1810, c. 12, uses the words "in *all* cases where *bonds* are given on the obtaining of an injunction," the remedy shall be the same as upon appeal bonds. The act 1800, c. 9, without declaring the form, declares the *object* of the bond; and any bond which secures that object, shall be effectual. The condition of the bond is either sensible or insensible, and the objection is answered either way. If the latter, the bond is single, and should be read as such. Such a bond is not forbidden by the statute, and the law gives the condition as well as though it had been expressed.* But the condition is not insensible. A construction will, if practicable, be always put on conditions, so as to make them sen-

(23) sible. Thus, in a bond conditioned for the payment of one hundred pounds by instalments, until the sum

* Com. Dig. Obligation, E.

of *one* pounds be paid, the word *"hundred"* will be supplied;* and conditions will be construed according to the true intent and meaning of the parties, without minute attention to the words.† The case of *the Governor* v. *Meilan*, cited on the oter side, shews that bonds taken by a public officer, which are not pursuant to a statute, are not always void; but they will be supported in favor of the justice of the case. Interest is given by a statute on debts recovered at law, and forms part of the judgment, and therefore ought to be included in the bond; and, as for the costs, they are expressly mentioned in the act of 1800; and, therefore, a decree was properly made for them.

TAYLOR, *Chief-Justice*, after stating the case, proceeded to deliver the opinion of the Court:

The act of Assembly does not prescribe the form of the condition of the bond; but the obvious design of it was to provide for the payment of the sum stayed and all costs, upon the dissolution of the injunction. Any condition, therefore, which, by a reasonable construction, stipulates for that object, ought to be supported. That the complainant should dissolve his own injunction is what, we may safely conclude, was never meant. It is manifestly a clerical error, and inserted instead of the words, "if J. G. Gully and Watson shall dissolve the injunction," &c. In that sense it ought to be construed to fulfil the intent of the parties, according to the case of *Bache* v. *Proctor*. But if those words be rejected as insensible and impossible, the condition still provides for the payment of the amount of the judgment. When complainant has had the full benefit of this bond, by the advantage of a trial on the equity of his claim, it would be highly unjust that he should be allowed to defeat it
(24) by a critical objection; and, in such a case, I should yield to express authorities with reluctance.

The decree below is affirmed.

* 1 Marsh. 31.

† Bache *v.* Proctor, Doug. 382, Nares *v.* Rowles, 14 East. 509,—Doug. *v.* Clark, 14 Johns. 177.

## THE STATE *v.* MASON SCOTT.

*From Wake.*

A person called as a juror in a capital case, said on oath, that he had not formed nor expressed an opinion respecting the guilt or innocence of the prisoner; and, after the verdict, it was proved that he had declared, a few minutes before to a third person, "that he could not serve, because he had made up his opinion;" which was unknown to the prisoner at the time he accepted the juror.

*Held*, that there shall not be a new trial—first, because such declaration was not on oath; and, secondly, because it is contradicted by the juror on oath.

If the sanity of a juror be alleged as a reason for a new trial, being a disqualification so easily perceptible from its nature, it must be proved by clear and full evidence.

The declarations of a party cannot be offered in evidence on his behalf in any case, unless they accompany acts, and be *pars res gestæ*, and are offered as such. They are not admissible even to shew the insanity of a prisoner.

*Held*, therefore, where a prisoner had committed homicide at 10 o'clock at night of one day, that evidence of what *he said the next morning* could not be received to prove his derangement.

The property in a slave is not of the essence of the offence of the murder of him, and it is immaterial whether it be laid in the indictment or not: Hence it need not be proved upon the trial as laid. *Quere*—If the property be proved to be different from that laid?

If a statute take away clergy from any *offence*, and another statute, either prior or subsequent, create that offence by its known, legal, and technical name, all the qualities of its name will attach to it: Hence it will stand ousted of clergy.

The statute 23 Hen. 8. c. 1. ousted *murder* of clergy: Our act of 1817, c. 18 gives to a slave the character of a human being, and places him within the peace of the State, so far as regards his life:

Hence it is held, that one, convicted of wilfully killing a slave with malice prepense, is guilty of *murder*, and not entitled to the benefit of clergy.

The prisoner was indicted, tried and convicted at the Superior Court for Wake, at April Term, 1820, before
(125) *Paxton*, Judge. He was charged with the *murder* of "a negro man slave, Caleb, the property of Frederick S. Marshall;" and the indictment concluded, "contrary to the form of an act of the General Assembly, and against the peace and dignity of the State."

The prisoner was allowed to ask the jurors upon oath, as they were called to the book, whether they had expressed or formed an opinion unfavorable to him? One Daniel Peck, being called, was thus interrogated, and replied that he had not formed nor expressed any opinion respecting the guilt or innocence of the prisoner,—and he was then elected and

sworn on the jury. The deceased was slain with a dagger about ten o'clock at night. One ground of defence, taken on behalf of the prisoner, was, that he, the prisoner, was insane at the time. To prove the truth whereof, his counsel offered to give in evidence his own declarations, in connection with his conduct, the next morning after the homicide, to be considered by the jury in connection with his conduct before the homicide, and on the same night and within a few minutes of the time of giving the stroke. But the Court rejected the evidence of the declarations and conversation of the prisoner on the morning succeeding the homicide.

For the purpose of shewing the deceased to be the property of F. S. Marshall, the Attorney General called a witness, who proved that he had long known Caleb; that he had formerly belonged to one S. Marshall, and continued to be his property until he died, several years ago, leaving an only child, who is the said F. S. Marshall, a minor. The prisoner's counsel moved the Court to instruct the jury, that the evidence did not sufficiently prove the property as laid in the indictment. But the Court refused to give the instructions as prayed for, and, on the other hand, instructed the jury, that the evidence, if believed, was sufficient.

After the verdict, a new trial was moved for upon the four grounds following:

First. That the juror Peck had made up an opinion
(26) against the prisoner before he was sworn;

Secondly. That the same juror was insane, and without capacity to be a juror;

Thirdly. Because proper evidence offered on behalf of the prisoner had been rejected;

Fourthly. For misdirection of the Court, upon the proof of the title of the deceased.

The first reason was supported by the affidavit of a person, who swore that he was standing near to Peck, when he was called as a juror, and that he asked him if he meant to serve on the jury; to which he replied, "no, I cannot, for I have made up my opinion," and that in a few minutes he was sworn, and took his seat in the jury. The second reason was also supported by two affidavits; the one made by a physician, who swore, that twelve months before that time, Peck had been deranged by intemperance; that he had seen him within the week of the trial intoxicated, and, from that circumstance, thought it probable that his mind was deranged;

the other made by a mechanic, who swore, that Peck came to his shop before breakfast on the day of the trial, and his conduct was so strange, and his expressions so absurd, that he believed him to be deranged. The Court overruled the motion. The prisoner then prayed the benefit of clergy; but the Court refused to allow it, and passed sentence of death on him, and he appealed to this Court.

The case was argued by the Attorney General for the State, and by Seawell and Manly for the prisoner.

*Manly.* He relied upon the affidavits to shew that the two first reasons were founded in fact, and no affidavits had been offered by the State to contradict them. If Peck's derangement had been known, or his declaration that he had made up his mind, it would have been a good cause of challenge.*

(27) The prisoner did not, and could not in the nature of things, know those facts. And this rule is laid down, that whatever forms a good cause of principal challenge, if known, is sufficient to set aside the verdict, if not known in due time to challenge.† Upon the third point he contended, that the evidence was competent. From the nature of the fact to be proved, it is necessarily so. The *conversations* of a person ought to be submitted to the jury *as facts*, from which they may infer that he is or is not *non compos*; because rational or irrational opinions, connected conversations, or idle talk, are the strongest proofs, indeed the very tests of sanity or insanity; and the jury are the proper judges of that,‡ and the declarations being made the next morning, makes no difference.§ The property ought to have been proved, as laid. In cases of larceny, it is necessary to enable the accused to plead one acquittal or conviction, in bar of another prosecution.‖ The same reason holds here, in order to *identify* the deceased. The case of Davis,¶ shews that the property must be truly laid. But at all events, the prisoner is entitled to the benefit of clergy. The statute 1817, c. 18, enacts, "that the killing of a slave shall be *denominated* and *considered* homicide, and shall partake of the same degree of guilt, as homicide does at common law." And at the common law, homicide was clergiable.

*3 Bac. Abr. *Jury* A. *Co.* Lit. 156.

† U. States v. Fries, 3 Dal. 515. Lady Herbert's case, 11 Mod. 119, Salk. 645.

‡ 1 Hale, P. C. 32, 33.

§ Id. 36.

‖ State v. Weaver, 2 Hayw. 54.

¶ 2 Law Rep, 252.

TAYLOR, Chief Justice.—That is not doubted: all felonies were clergiable at the common law; that is, all who could read were burnt in the hand. The question is, whether murder has not been ousted of clergy.

The *Attorney General*, on the other side.—The affidavits do not shew that Peck said his mind was made up *unfavorably* to the prisoner; and the oath of Peck, when called to the book, expressly contradicts it. As to his insanity, the
(28) proof is too weak: one witness saw him out of his head from drunkenness a year before, and knows nothing of him since; and it does not appear that the other witness had any acquaintance whatever with him. The evidence was properly rejected. It is a rule, which has no exception, that a man's own declarations shall never be evidence for him, unless they accompany acts that are evidence, and form part of the *res gestæ*. The Court was divided in Fries's case; and the rule is laid down too broad there. Where a juror said he was a freeholder, when he was not, the verdict was not set aside, though it would have been cause of challenge, if known.*

There have been many legislative regulations to guard the persons and lives of slaves. After many fruitless attempts, the act of 1801, c. 21, at length inflicted the punishment of death, without benefit of clergy, upon any person convicted of feloniously, wilfully and maliciously killing a slave. The murder of a slave, therefore, has been ever since ousted of clergy, and this indictment is founded upon that statute. The act of 1817, c. 18, does not alter the rule, as regards murder—that was not the design of the act. After the act of 1801, serious doubts were entertained whether the slayer of a slave could be guilty of manslaughter, and some of the judges decided that he could not. The scope of the act of 1817 was therefore to remedy that inconvenience: to constitute a negro a human being, and to give him farther protection, instead of lessening it, as contended for on the other side. It was to graduate the act of killing a slave into murder, manslaughter and excusable homicide. Murder had already been provided for, and expressly ousted of clergy. The two acts can thus stand together, and are not contradictory to each other.

* State v. Greenwood, 1 Hayw. 141. Kirby's Rep. 427.

It is immaterial in whom the property is laid, or whether it be proved as laid. It does not constitute a part of the offence, and, therefore, need not be stated nor proved.
(29) It is like the case of Pye,* who was charged with robbing from the person *near the highway*, or *in such a house*, when it was held that it was unnecessary to prove the place or the property of the house, when the robbery was committed.

*Seawell* replied for the prisoner.—He is entitled to clergy. The indictment is in the common form, but concludes against the form of the statute. The Attorney General now says, *ore tenus*, that it is predicated upon the st. 1801, c. 21. But the time laid in the indictment is subsequent to the passage of st. 1817, c. 18, and the fact was committed subsequently. The latter act embraces this case. The title of it is, "An act to *punish* the wilful and *malicious* killing of slaves;" and covers, therefore, every felonious killing. It is obvious, that the object was both to *define the offence* and to prescribe the *punishment*. The act is very lamely drawn, and being darkly expressed, points out no one object in the body of it *plainly*. It is sufficient, however, for the prisoner, that it constitutes and denominates the slaying of a slave, homicide at common law, and is inconsistent with st. 1801, c. 21. What is *homicide?* It is the killing of a human being, and is of three kinds: felonious, excusable and justifiable. The last has no share of guilt; the second very little; and the third, being again divided into murder and manslaughter, is the object of punishment.† And if this act of 1817 stood alone, it is clear that clergy would not be taken away; because it is not so expressed in the act. All felons are entitled to clergy, unless expressly taken away by the statute;‡ and no general words in a statute will oust it.§ So it was likewise under our act, 1790, c. 11, against bigamy—the deficiency was supplied by st. 1809, c. 26, which was drawn by Mr. Archibald Henderson. Suppose the words of the act of 1817 had been
(30) "shall be considered and denominated *felony*," it would necessarily follow that it was clergiable; and so it is with every species of homicide "*at common law*." These last words, as well as every other word in a statute, must be retained, and have a meaning given to them in the construc-

* 2 East. C. L. 785. †4 Bl. Com. 177. ‡ Id. 98. § Kel. Rep. 104.

tion; and they must affect the *punishment*—they can mean nothing else. If they do not apply to the punishment, the act would mean the same if the words were stricken out. The act of 1801 takes away clergy, and thereby placed the offence on a different footing from that on which it stood at common law. That of 1817 has its operation by *restoring* the common law, and is therein inconsistent with and repeals the former. It is no objection that the latter embraces more than the former: if it provide for all and dispose of all that is in the first, it is sufficient. At all events, if st. 1801 be not repealed by the other, the indictment ought to have concluded "*contra formam statutorum.*"

He also contended very strenuously that the *property* was not proved, and *ought* to have been proved as laid. The title was shewn to have been in S. Marshall; he was dead; it did not appear that he had any personal representative; and F. S. Marshall is only his son, which gives him no property in the slave. It was not even proved that he ever had the possession. Whenever a fact is laid as a part of the *description of the offence*, it must be proved as laid; and so of the description of the person, *the subject* of the offence. Who is the subject of the offence? *A slave.* What slave? Caleb, the property of F. S. Marshall. We may as well dispense with proof that the deceased was named Caleb, as that he was the property of F. S. M.; and surely the prisoner could not have been convicted without any proof upon either point. If there be no evidence necessary to prove the *identity*, an acquittal here could not be pleaded in bar of an indictment for the murder of *my* Caleb; for as to all things descriptive of the *particular* offence, they must appear upon the
(31) face of the indictment upon a plea of *auterfoits acquit;* and an acquittal of the murder of Marshall's Caleb is no more a bar to an indictment for the murder of my Caleb, than one for an assault on Marshall would be for an assault on me. Pye's case has been cited on the other side. That was a proper decision; for it was robbery, let it be committed where it might; but it has no application to this case. The doctrine of *immaterial* averments has no connection with this question. But the true rule even on them is, if the *whole subject matter* improperly described, or not proved as described, (which is the same thing), can be stricken out and the indictment still remain *perfect*, the introduction of the matter shall not vitiate the indictment. Common sense

would seem to say, that what was useless should not prejudice. That is the real rule: there may be *dicta* against it, but no judgment that I know of. If, however, there be, when *cases* and *principles* conflict, there ought to be no hesitation in deciding which to respect. In *Savage* v. *Smith*,* it was necessary to state only an execution; but the pleader stated *also* a judgment, and it was held that he must produce it. So, where an indictment for conspiracy charged the unlawful combination, which *per se* constituted the offence, but went on also to state *for what purpose* the money was thus obtained by the conspirators, it was ruled that, therefore, it must be shown in proof, and the defendants were acquitted.† To apply the rule here: strike out "*slave*" altogether—I do not mean the name, but the fact of his being a slave at all—and the indictment would be fatally defective: for *as* a slave, as the property of some person, he is the subject of criminal homicide under the act of Assembly. Giving no other description but that the prisoner killed a human being called Caleb, would be entirely too lax, and wholly insufficient. An indictment must always state and describe with *certainty* the person upon whom the murder was committed, unless it be stated, that the person is to the jurors unknown.

(32) HENDERSON, *Judge*, delivered the opinion of the Court:

After stating the facts and the questions as they appear upon the record, he said, the ground of the first reason for a new trial is not sufficiently proved. Ruth states that Peck *informed* him that he had formed an opinion. When Peck said so, he was not on oath; and when offered as a juror, he denied it *on oath*. The second reason is in the same situation. It does not appear what was the state of Peck's mind at the time he took his seat as a juror. One of the witnesses speaks of his situation twelve months past; and, although he saw him drinking during the week of the trial, he does not pretend to say that his mind had actually become affected, but concludes that possibly it might. The affidavit of the other witness does not prove anything; and both taken together, can scarcely raise a doubt, much less satisfy us, that the juror was deranged when he was sworn on the jury. The nature of the disqualification would render it perceptible to many of the numerous bystanders, who

*2 W. Bl. Rep. 1101. †2 Camp. Rep. 231.

commonly surround a Court, and more full and satisfactory evidence of the fact, if true, should have been produced.

Were I left to myself, unshackled by adjudications, I must confess that I should be inclined to respect the third reason; but it is in vain for me to contend against precedents—I must submit to the law as I find it written, and my brothers entertain no doubt of the correctness of the decisions upon principle. The declarations of the party, say they, cannot be offered in evidence in his behalf, unless they accompany acts. They then form part of the acts, and, as such, are heard. But, with due deference to these opinions, it appears to me, that a man's acts are as much within his control as his words, and that both ought either to be received, or both rejected. Yet it is the daily practice to give the party's acts in evidence for him. I do not contend, that the party's declarations should be given in evidence for him to prove the truth of the facts declared or asserted by him; but
(33) only that the jury should be at liberty to draw inferences from his having made such declarations.

The last reason is, that the Court refused to instruct the jury as to the effect of the testimony, allowing it to be true, relative to the title of the slave Caleb. This is a demurrer to evidence *ore tenus*. Observing that the evidence does not prove the property in the deceased to be otherwise than as laid, is it then a fatal defect, even if it be admitted that it does not prove the property to be as laid? We think it is not. The ownership forms no part of the offence: it is equally criminal to kill the slave of one person as of another. The prisoner is no further interested in having that stated, than for the sake of identity. We give no opinion upon a case, where it is proved that the property is in a different person from the one alleged in the indictment. Had the prisoner been acquitted by the jury for this defect of proof, there can be no doubt but that on a second indictment for killing the same slave, Caleb, charging him to be the property of some other person than F. S. Marshall, he could safely rely on a plea of such acquittal, with proper averments that the slave Caleb, mentioned in one indictment, is one and the same person with the slave Caleb mentioned in the other. This incontestibly proves, that the title or ownership of the slave is not of the essence of the offence of killing him. For then an acquittal upon the charge of killing a slave, the property of A. could not be an acquittal for killing a slave, the prop-

erty of B. This case is within the principles of Pye's case, and that of Susanna Johnson. Pye was charged with robbing a person in the dwelling house of A; the robbery was proved to have been from the person, but it was not proved to whom the house belonged. Upon conference of all the Judges, it was held to be immaterial.*

The motion for a new trial must, therefore, be overruled.

(34) To avert the punishment which the law has affixed to *murder*, the counsel for the prisoner insists that he is entitled to clergy. This depends on the construction of the act 1817, in connection with former acts on the subject of murder. As a preliminary remark, I will observe, that at the common law, all felonies (murder inclusive) are punishable with death. But a clergyman, from the veneration in which the clerical character was held by the founders of our law, was exempted from the punishment of death, if the bishop would claim him as a clerk,—and of his being so, reading was the evidence. Hence came the benefit of clergy. In process of time, this benefit was extended to all persons; and thence it came to pass, that the most enormous crimes were unpunished. The Legislature perceiving this, hath proceeded, from time to time, to take away the benefit of clergy from certain offences. The consequence is, that clergy is allowable in all felonies, but where it has been expressly ousted by statute. The question, therefore, is reduced to this: Is the benefit of clergy taken away from *the offence*, of which the prisoner is convicted?

The statute 23 Hen. 8, c. 1, ousteth clergy in cases of wilful murder, of malice prepense. Our stat. 1817, c. 18, declares the offence of killing a slave shall thereafter be considered and denominated homicide, and shall partake of the same degree of guilt, when accompanied with the like circumstances, that homicide does at common law. The prisoner has been convicted of killing the slave Caleb with malice aforethought; and such a killing of a human being is, at the common law, murder. Of murder, therefore, is the prisoner guilty. The effect of the act of 1817, is to give to a slave the character of a human being, and to place him *within the peace* of the state, as far as regards his life. This latter act, therefore, virtually declares this offence to be murder, and the statute 23 Hen. 8, takes away clergy. Nor does it make

* 2 East's Cr. L. 785.

any difference whether the benefit of clergy be taken away by the same statute which creates the offence, or by (35) any other, prior or subsequent. For, when the supreme authority creates an offence, giving it a well known legal and technical name, the offence assumes all the qualities of its name: that is, it becomes the thing the Legislature declares it shall be. Our statutes of bigamy, mentioned in the argument, bear no analogy to this case. The statute 1790, provides that bigamy shall be felony, and that the felon shall suffer death; yet a person, convicted under it, was allowed his clergy, because it was not taken away by that or any other statute, and, at common law, it still remained. We are not, however, left to our own reasoning alone, upon this question; the authorities are the same way. Foster, in his Treatise, lays down the laws thus:* The stat. *de Clero* 25 Ed. 3, provides that clerks convict for treasons, or felonies touching all persons, other than the king himself, or his royal majesty, shall have privilege of Holy Church, Treasons created by after statutes relative to the coin, the establishing of the king's regal, and abolishing the papal supremacy, were ousted of clergy without express words, as coming within the exception of the *stat. de Clero*, because they were treasons touching the king's royal majesty.

We are therefore of opinion, that the prisoner is not entitled to the benefit of clergy, and that judgment of death be awarded against him.

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(36) THE STATE BANK OF NORTH CAROLINA *v.* CLARK & M'NEIL.

*From Cumberland.*

Acceptance and payment of a check is *prima facie* evidence, that the acceptor had the necessary funds of the drawer: and it is incumbent on the former to show that he had not.

The State Bank of North Carolina is a mere private corporation:

Hence, the books of accounts kept by the bank, of the dealings between it and a customer, are not evidence for the bank in a suit between it and the customer.

This was an action of assumpsit, for money had and received, and money laid out and expended, to the use of the defendants. Upon the trial, the facts were, that the defend-

* Fost. Tr. 190, 191.

ants, being merchants at Fayetteville, were customers of the branch bank at that place, and kept large deposits, for which they had drawn checks from time to time, that had been honored and paid. The checks were produced in Court by the plaintiffs, and admitted by the defendants. The plaintiffs further alleged, that those checks were for larger sums than had been deposited, and that defendants had *overdrawn*. To prove that fact, they offered to give in evidence the books of accounts kept at the bank with the defendants, whereby it would appear, that their deposits did not equal the amount of the checks, by the sum of three thousand dollars, and upwards. The Court rejected the evidence, and the jury returned a verdict for the defendants. The plaintiffs moved for a rule for a new trial; which was refused by the Court, and an appeal taken to this Court.

*Ruffin*, for the defendants, cited Peake's Evid. 91, 231; Doug. 593, note; 3 John. Rep. 226.

The opinion of the Court was delivered by TAYLOR, Chief Justice.

The acceptance and payment of a check is *prima facie* evidence, that the plaintiffs had in deposit money of the
(37) defendants wherewith to pay it; and if the fact were not so, it is incumbent upon the plaintiffs to prove by the state of the accounts, that the defendants have overdrawn. But that cannot be shown by the books of the bank, which is only a private corporation, and they are inadmissible in favor of the plaintiffs.

The judgment below is affirmed.

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MANNING *v.* SAWYER.

*From Chowan.*

The Court will not entertain an appeal, but will direct a certificate under the act of 1818, c. 2, s. 7; unless the appellant bring up the appeal bond with the record, and file it in due time:

The appellant filed the record in due time, but omitted to file the appeal bond with it: *Held*, that on a mere suggestion and motion on behalf of the appellant, a *certiorari* will not be granted: but that on a proper case appearing by affidavits, a *certiorari* will be granted.

A declaration in assumpsit, that defendant promised to pay the plaintiff for a certain house what "A. B. and C. should *say it was worth*," is supported by giving in evidence a written agreement, that defendant would pay what "A. B. and C. should *say*."

The plaintiff obtained a verdict and judgment below, for a large sum of money, and the defendant appealed to this Court. He brought up and duly filed, the transcript of the record; but omitted to file the appeal bond.

*Gaston*, for the appellee, moved to dismiss the appeal, for want of the bond.

*Hogg*, on the other side it, opposed it, and moved, at the same time, for a *certiorari* to the Court below, to get up the bond. He argued that the Court ought to grant it, because a refusal would be so penal to the appellant. Appeals are beneficial, and ought to be favored; and the Court will
(38) always presume that they have been regularly taken, and, of course, a bond given. The appellant has brought up the record, which shews that he has not intentionally abandoned his appeal; and he does not now ask the Court to go to trial without the bond being here, but, on the contrary, to have it brought up, so as to satisfy the Court that the appellee is secured in his recovery. It is obviously the fault of the clerk in not giving the whole record to the appellant, who cannot be presumed to have sent up only a part of what he received.

HENDERSON, Judge, said that he thought the Court was indeed to presume that a bond was given, when the appeal was granted. But, admitting that to be so, the absence of the bond must be accounted for by the appellant, to whom the law confides the record and his own bond, as part of it. As he has the custody of the bond, it is not too penal, but is quite just to dismiss, or rather, not to receive the appeal; otherwise an appeal would be always taken for delay. The *certiorari* ought not, therefore, to be granted, unless a proper case be made upon *affidavit;* but the appellee is entitled to a certificate upon the act of Assembly.

The rest of the Court concurred.

Some days afterwards, *Hogg* renewed his motion, and supported it by affidavits, that the appellant had duly applied to the Clerk below for the record, and received the transcript which he filed; that he fully believed that he had done all that was required of him, and that he and the Clerk were were both ignorant that it was his duty to bring up his own bond; that he had never intended to abandon his appeal, or

delay the appellee. Therefore, the writ was granted; and was returned, together with the bond and whole record to a subsequent day of the same Term.

And by the record, as now filed, the case appeared to be this: the plaintiff declared in assumpsit on a special agreement, that, in consideration that he, the plaintiff, agreed
(39) to sell to the defendant certain buildings and houses described in the declaration, he, the defendant, agreed to pay the plaintiff therefor whatever sum of money *any three disinterested men should say they were worth;* that J. S. and two others, being disinterested and appointed by the parties, valued the buildings at $1,750, whereof the defendant had notice; that plaintiff had always been ready, and offered, &c. but that the defendant refused, &c. The plea was "*non assumpsit.*"

Upon the trial, the plaintiff produced in evidence a written agreement between him and the defendant, whereby Sawyer "agreed to give to Manning the sum that any three disinterested men *shall say* for the property whereon M. lives, taking into view all the circumstances of the case, consisting of dwelling houses, &c." And they thereby appointed "the said J. S. and the other two, and bound themselves, to abide by the decision of the said persons." Manning had built those houses on Sawyer's ground; and the referees fixed the value at $1,750, and gave them notice of it; and the plaintiff offered to comply, and demanded the money, but the defendant refused to make payment or accept the houses. For the defendant, it was objected, that the agreement produced did not support the declaration, but varied from it, that the declaration set forth a contract to pay what "J. S. and the others might say *the houses were worth;*" whereas the agreement itself was, that he would pay "what they might *say*, taking all circumstances into view;" and, therefore, that it ought not to go to the jury. But the Court overruled the objection, and suffered the evidence to be read; and the jury found a verdict for the plaintiff according to his demand. The defendant prayed for a new trial, which the Court refused, and gave judgment; from which he appealed to this Court.

*Hogg*, for the appellant, relied again upon the variance: what the arbitators might *say*, and what they might *say* the houses *were worth*, are two different things: more

(40) especially in this case, where one person had built on another's ground, and it was left to friends to determine, *under all the circumstances* of the case, how much the owner of the soil should pay to another, who had erected buildings upon his land, innocently, it may be, or by design, for aught we can see from the case: At all events, the contract, such as it was, ought to have been set out exactly, and then the law, and not the jury, would decide whether the plaintiff could recover.

*Gaston*, for the appellee.—The contract, as shewn in evidence, and that stated in the declaration, are substantially the same. The appellant was to pay what three men would *say*—what ought they to say? What ought and what would the law say? That he should pay what the houses were *worth*. That must have been the meaning of the parties. It could not have been intended that the arbitrators should, without any rule, and from a mere arbitrary authority, fix a sum to be paid by the defendant to the plaintiff; and there could be no other rule than the value of the buildings.

As to the point of pleading—it is not necessary to set out a contract in its very words; it is sufficient and proper to set it out according to its substance and legal effect.* And a material word will be supplied, if necessary, as in *King* v. *May*.† So the Court will look to the context, to determine whether the variance be in substance or not,‡ and will make the words "*U. States*" mean "*United States*."

TAYLOR, Chief-Justice, said, that the agreement between the parties leaves no doubt as to their intent in making the contract, and it may be well doubted whether the insertion of the word "*worth*" would have made it more clear. In the award of the persons chosen, the true import of the (41) contract is declared, and the declaration truly pursues its meaning. If there be a variance between the declaration and the agreement, it is too literal and insignificant to affect the case, and there must be judgment for the appellee.

The other Judges did not deliver any opinions, but agreed that the plaintiff was entitled to judgment.

* 1 Chitty's Pl. 299 302. 1 Saund. 233, Note 2. 10 Mass. Rep. 230.
† Doug. 183. ‡ 5 Johns. Rep. 1.

## MURRAY *v.* SMITH.

*From Buncombe.*

A. sold to B. a tract of land on the 6th November, 1811, and took from him, in payment therefor, a bond given by H. to C. of which B. was then the holder, without endorsement to or from B. under this special agreement: that A. should sue H. in a *short time*, and if H. failed, B. would then pay it. A. brought suit against H. in September, 1812, tried it in October, 1815, and failed to recover: and, in October, 1816, he sued B. and declared, first, for the price of the land sold. and secondly, upon the special agreement.

*Held*, upon the pleas of the statute of limitations and *non assumpsit*, that A. could not recover upon either count: for the statute of limitations began to run from the making of the contract as laid in the first count; and the laches of the plaintiff, in not bringing suit against H. for ten months, discharged B. upon the special agreement set forth in the second.

"*Reasonable time*" means, that a party shall do an act as soon as he conveniently can: and it seems the Court is to judge of that.

When a cause is once ordered to the Supreme Court, that Court acquires jurisdiction, and the Superior Court cannot take any further step in it. The Supreme Court, therefore, will not regard any subsequent proceedings in the Court below.

This was an action of assumpsit, in which the declaration contained many counts; but the two hereinafter mentioned were the only material ones. The first was for the sum of four hundred dollars, due from the defendant to the plaintiff as the balance of the price of a tract of land sold and conveyed by the latter to the former; the second was upon a special agreement of the defendant, that in consider-
(42) ation of his being before that time indebted to the plaintiff in the sum of four hundred dollars, as and for the price of a tract of land sold and conveyed by him to Smith, and that he, the plaintiff, would take a bond given by one S. Hogsett to one I. C. for four hundred dollars, that became payable on the____day of January, 1811, without the endorsement of the defendant, and sue the said Hogsett thereon, and if Hogsett should fail to pay the same, he, the defendant, would make the said bond good, and pay to the plaintiff the monies therein mentioned. The plaintiff then averred, that he took the bond on 6th day of November, 1811, and brought suit thereon, and that Hogsett failed to pay the money, and that thereof, he gave the defendant notice.

The pleas were "*non assumpsit*" and "*the Statute of Limitations.*"

The cause came on for trial before *Seawell*, J. at October

term, 1818, when it appeared in evidence, that in November, 1811, the plaintiff sold to the defendant a tract of land, and received the bond in the declaration mentioned in part payment; that it purported to be signed by S. Hogsett, who was then dead, and was payable to one I. Carson, who had not endorsed it, nor did the defendant endorse it; that at the time of passing it to the plaintiff, there was a doubt of the sufficiency of the assets of Hogsett, and it was agreed by the defendant with the plaintiff, that if he would bring suit in a short time, and Hogsett failed, he, the defendant, would pay it. The plaintiff brought suit, in the name of Carson, in September, 1812, all the parties living in the same county; and at October, 1815, brought the same to trial, when a verdict was rendered for Hogsett's executor, upon the plea of *non est factum*. This suit was commenced on the 4th day of October, 1816. The Court charged the jury, that as to the implied promise which the law might raise to pay the price of the land sold, the act of limitations began to run from the time of the bargain; and, therefore, barred the
(43) plaintiff's recovering upon the first count, inasmuch as he did not bring suit until October, 1816. That to enable the plaintiff to recover on the special agreement, he was bound to bring suit against Hogsett's representative within a *reasonable* time; and that "reasonable time" meant, as soon as the party conveniently could. The jury found a verdict for the defendants upon both counts, and a rule was granted for a new trial, which was adjourned by the Judge to the late Supreme Court for determination.

The record, however, was not sent into the late Supreme Court, before the act of 1818 abolished it and created the present Court; and the Court below, after several continuances entered, ordered a new trial. The case came on for trial again before *Mangum*, J. at April term, 1820, when the jury, under the charge of the Court, found a verdict for the plaintiff on the count upon the special agreement; and from the judgment rendered thereon, the defendant appealed to this Court.

*Wilson* appeared for the plaintiff, and *Gaston* for the defendant.

HALL, J., delivered the opinion of the Court:

This suit was ordered to the Supreme Court for decision

by the Superior Court of Buncombe, at October Term 1818; and by that order, and the act of 1818, c. 1, this Court acquired jurisdiction over the case. The Superior Court had no power to proceed further in it, until after the decision of this Court upon the question submitted to it. The proceedings, therefore, of April term, 1820, cannot be regarded as any part of the record upon which this Court is to pronounce judgment. We can recognize that record only which comes from the Court held in 1818.

By that, it appears that the suit was brought in October, 1816—more than three years after the contract was entered into, which was in November, 1811. The defendant hath pleaded the statute of limitations; and, in order to
(44) avoid its operation, the plaintiff relies upon that part of the contract by which it was made his duty to bring suit against Hogsett before he could bring the present suit. I am of opinion that the charge of the Judge was correct, as well as the finding of the jury in conformity thereto. Ten months had elapsed from the time the contract was made before suit was brought against Hogsett; which was more than a reasonable time for that purpose, and cannot be supported by the contract, by which he was bound to do it *in a short time*. I therefore think that the plaintiff's claim in this action, for the money for which he sold his land to the defendant, is not taken out of the operation of the statute of limitation. As to the circumstance of the defendant's having no effects in the hands of Hogsett, as evidenced by the plea of *non est factum* being found for him, it may be observed, that that issue might have been so found for want of testimony: the subscribing witness might not have been present, or, if none, other sufficient testimony perhaps was wanting. But, if it were otherwise, there was a reason still why the obligation raised by law of suing in a reasonable time, and giving notice to Smith should not be dispensed with, when it is recollected that Hogsett's bond was not given to Smith, but to Carson; and if the note were not genuine, Smith might be ignorant of that fact, and would naturally look to Carson for redress. But this inquiry is unnecessary—the plaintiff's delay in suing Hogsett makes it so. That delay will not admit of his availing himself of any excuse for not bringing the present action within three years after the cause thereof accrued. Let the rule for a new trial be discharged.

(45) Den on Demise of TATE *v.* SOUTHARD.

*From Burke.*

Under the act of 1791, c. 15, it is sufficient to show, that, by common reputation, a tract of land has certain known and visible lines and boundaries, although those lines and boundaries belong to adjacent tracts, and were not made for the land in dispute, nor, in any deed thereof, are recognized as the lines of such tract: For reputation and hearsay are, of themselves, evidence of boundary.

A verdict, which finds a fact contrary to a legal presumption, is repugnant and void.

*It seems*, that the return of the Sheriff upon a *fi. fa.* is a *colorable title* under the act of '91—though no deed be made by the Sheriff.

A new trial will be granted for misdirection, although the record does not show that the verdict ought to have been otherwise, if the Court had directed otherwise.

This was an action of ejectment, in which the lessor of the plaintiff claimed title to the lands in dispute, by a grant from the State, bearing date the 11th day of October, 1814. The defendant claimed the land under a Sheriff's sale made to one James Greenlee, under a judgment and execution against one T. Kennedy in 1783; and that Greenlee and the defendant, who claimed under him, had a continued possession for upwards of twenty-nine years, before this suit was brought, and defendant was then in possession. The defendant showed no grant to Kennedy or any other person for the land, nor any deed from the Sheriff to Greenlee or from Greenlee to himself. He proved, however, that the land claimed by him was surrounded by other tracts, and that it was understood and believed, by all the neighbors, that the land thus enclosed by the lines of the surrounding tracts, was Kennedy's at the time of the sale in 1783, and it had been called Greenlee's ever since; that, although the witnesses had never known any lines run and marked for Kennedy's tract, yet an old grant for adjoining land (which was produced) called for Kennedy's lines; that about thirty acres were cleared and fenced at the sale in 1783, and had
(46) continued to be enclosed and cultivated ever since.

It was also proved, that many years ago, a branch was shown to a witness, by a person now dead, as one of the dividing lines between Kennedy's and another tract; and another witness proved that he also had been told long ago, by a person now dead, and who lived in the neighborhood, where another of Kennedy's lines crossed a certain road; and by those lines the defendant claimed now to be bounded.

According to these facts, the defendant insisted that, under the act of Assembly of 1791, c. 15, he had title to the land in dispute. The case was tried before Mangum, Judge, who charged the jury, that if the lines which surrounded the land in controversy were not originally run for that tract, but belonged to the adjacent tracts, then the land in question was not inclued in such known and visible lines and boundaries as are required by the act of 1791, unless by some matter subsequent, as a grant or *mesne* conveyance of the land in dispute, those lines of the surrounding tracts had been recognised as the lines and boundaries of the land in question; and here no such deed was produced. The jury, under the charge of the Court, found a verdict for the plaintiff, and also found the fact expressly, that no grant from the State had ever issued to any person for the tract of land mentioned in the declaration, until the one to the lessor of the plaintiff, of 11th October, 1814.

A rule was obtained by the defendant for a new trial, for misdirection of the Court; which was discharged and judgment rendered against him, and he appealed to this Court.

*Wilson* appeared for the plaintiff, but did not choose to argue the case, and submitted it.

HENDERSON, Judge, delivered his opinion.—I think the Circuit Judge erred in that part of his charge, wherein he directed the jury, that the lines of the surrounding tracts of land, if not made for the lands claimed by the defend-
(47) ant, did not satisfy the words of the act '91, that is to say, "*known and visible boundaries*," unless they had been recognized as the boundaries of this tract by some grant or *mesne* conveyance thereof. Boundaries frequently exist in common reputation, and it is for that reason that hearsay is evidence upon the question of boundary. It would, therefore, have been sufficient for the defendant to have shown that it was the common reputation and understanding of the neighborhood that his land was bounded by the lines of those surrounding tracts, although they were not originally made for it. Another question obscurely appears upon the record, which does not seem to have been made at the trial: It is, whether a title derived from a Sheriff's sale without a deed from the Sheriff is a *colorable* title under the act of 1791. But the facts do not sufficiently appear to war-

rant the Court in going farther than barely to notice them. For it is not shown by what evidence the defendant proved Greenlee to be a purchaser at Sheriff's sale—whether by parol or by the Sheriff's return. As to the fact found by the jury, that there never was a grant for the land before the one to the plaintiff's lessor—if a grant is necessary to be presumed to support the defendant's title, and he brings himself within the provisions of the act of 1791, the finding of the jury is against a legal presumption, which cannot be contradicted, and is therefore void. But at all events, there must be a new trial for the misdirection upon the question of "known and visible boundary," although it does not distinctly appear that the defendant can show a colorable title, as required by the act of Assembly.

The CHIEF JUSTICE and JUDGE HALL accorded; and a new trial was ordered.

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(48) HORTON *v.* HAGLER'S Executor.

*From Wilkes.*

When the Clerk of a Court of Record certifies that an instrument has been "*duly proved*" in that Court, it is implied that everything required by law has been proved—upon the maxim, *Res judicata pro veritate accipitur.*

But when he also states, *how* it was proved, and omits a material circumstance required by the law, the certificate of *due proof* is disregarded; because, by the certificate itself, it appears it was not duly proved.

*Held*, therefore, that where a Clerk of a County Court certified that a bill of sale for a slave had been "duly proved by the oath of D. H., who proved the handwriting of B. H., the subscribing witness, and of J. H., the maker of it," the bill of sale is not evidence, for the want of proof of the death or removal of B. H.

This was an action of assumpsit brought upon a warranty made by the defendant, upon a contract of sale of a slave, Peter, to the plaintiff; and was tried before *Mangum, Judge*, at March Term, 1820. To show the sale and the warranty, the plaintiff offered in evidence a bill of sale of the slave from the testator, John Hagler, to the plaintiff, witnessed by one Benjamin Hagler, who was dead at the time of the trial. On the bill of sale, was a certificate endorsed by the Clerk of the County Court of Wilkes, "That the execution thereof had been duly proved in that Court by the oath of D. H., who

proved the handwriting and signature thereto of B. Hagler, and of the testator, J. Hagler." And upon that proof it had been registered and certified accordingly. The Court suffered the plaintiff to read his bill of sale to the jury without further proof, although it was objected to by the defendant; and the jury, without other evidence of the contract, found a verdict for the plaintiff upon the *general issue.*

A motion for a new trial, upon the ground that the bill of sale ought not to have been received in evidence, was overruled, and judgment given for the plaintiff, from which the defendant appealed.

(49) The CHIEF-JUSTICE delivered the opinion of the Court:

If the Clerk had certified only, that the bill of sale was *duly proved*, it must have been understood that the death of the subscribing witness was proved, and that his hand-writing was likewise established in a proper manner. So much respect is paid to the acts of a court of record, that they must be received as regular, when so certified by the proper officer. *Res judicata pro veritate accipitur.* But when the certificate enters into detail, and goes on to shew in what manner the deed has been proved, the enquiry into the legality of the proof is open to the Court. In this case, what is meant by being "duly proved" is explained by the statement, that D. H. swore to the signature of Benjamin Hagler, the subscribing witness; and that shews that the paper was *not* duly proved, since the death or absence from the State of B. Hagler was not proved. It may be, that he was then alive and in the court-yard; and, therefore, the bill of sale was not proved by the best evidence the nature of the case admits of. That B. Hagler was dead at the time of the trial below is stated in the record; but there is no proof that he was dead or had removed, when the bill of sale was proved.

There must, therefore, be a new trial.

## HOLLOWAY *v.* LAURENCE.

*From Wilkes.*

**The subscribing witness to a bond must be produced to prove it, upon the plea of *non est factum:* but the parties are not confined to his testimony; and the obligee is at liberty to give evidence also of the hand-writing of the obligor, or of any other fact tending to establish that it is his bond—as his acknowledgment or the like.**

Debt on bond: plea, *non est factum.* Plaintiff produced the subscribing witness, who swore that he signed the bond, as a witness, at the request of the obligor or obligee, (50) but that he did not recollect which: he further said that he did not see Laurence sign the bond, nor hear him acknowledge it, and that it was not delivered in his presence. The plaintiff then offered other witnesses to prove the hand-writing of the defendant, and they were received by the Court, and proved the signature to the bond to be in the hand-writing of Laurence. The jury found it to be the deed of the defendant. He moved for a new trial, because improper evidence had been received; but it was refused, and he appealed to this Court.

The case was not argued here.

TAYLOR, Chief-Justice. The subscribing witness has given extraordinary testimony. He swears that he signed the bond as a witness, either at the request of Laurence or the obligee; yet he further swears that he neither saw the defendant sign the bond, nor heard him acknowledge it, and denies that it was delivered in his presence. From his own admission, his attestation might have been at the request of the defendant; and, if the jury so considered it, they might properly infer from it, the defendant's acknowledgment of the execution.

Where there is no subscribing witness, or where the subscribing witness swears that he did not see it executed, the deed may be proved by evidence of the hand-writing of the party to the bond.* And in *Grellier* v. *Neale*,† the subscribing witness had been requested to put his name to the deed by one of the parties who had signed it—so, where the person, who subscribes as a witness, does so without the knowledge or consent of the parties, as in *M'Raw* v. *Gentry*, 3 Campb. 232. In all these cases, the hand-writing of the

* Ley *v.* Ballard, 3 Espin. Rep. 173. Fitzgerald *v.* Elsee, 2 Campb. 635. † Peake's N. P. Cases, 23.

obligor, or his acknowledgment, is the best evidence the nature of the case admits of. and must be submitted to the jury. The judgment of the Superior Court must, therefore, be affirmed.

(51) HENDERSON, J., said, that after the testimony of the subscribing witness had been produced, either party is at liberty to give evidence as to the handwriting of the obligor—a bond is not obsolutely proved, because the subscribing witness swears to its execution, for the jury may not believe him ; nor is it destroyed by his denying his handwriting, or by his saying he did not see it executed. Other testimony may be given to prove that it is, or is not, the bond of the defendant; nor, indeed, are the parties confined to evidence of the obligor's handwriting, but may give any other testimony tending to establish that it is the parties bond.

HALL, J., assented; and the motion for a new trial was refused.

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## BRYAN *v.* SIMONTON.

*From Wilkes.*

**When a defendant in execution once obtains his liberty by the assent of the plaintiff, he cannot be retaken; and if he be one of several defendants in the same suit, the plaintiff can neither retake him nor take any of the other defendants.**

***And hence it is held*, that if there be judgment against two, and the plaintiff take one in execution, and discharge him, the bail of *both* is exonerated.**

This was a *scire facias* against Simonton, as bail for one Patterson, against whom, jointly with one Moody, the plaintiff obtained judgment in debt for four hundred and ninety dollars. The writ set forth the judgment and *ca. sa.;* and that Moody was arrested thereupon, and the return, that the other defendant, Patterson, could not be found, and that the defendant was bail for both of the original defendants. Pleas, 1 *Nul tiel record ;* 2, a special plea, that upon the *ca. sa.* against Moody and Patterson, the former was duly (52) arrested, and in execution, until the plaintiff discharged him from execution and set him at liberty. The plaintiff took issue on the first plea, and demurred to

the second; in which the defendant joined. It came on for argument before *Mangum, J.*, who sustained the demurer, and gave judgment for the plaintiff; and the defendant appealed.

*A. Henderson* and *Wilson* submitted the case without argument.

TAYLOR, Chief Justice, delivered the opinion of the Court:

After stating the case, he said, the demurrer admits that Moody was taken in execution, and discharged by the plaintiff; and the question presented is, whether that operates a discharge of the bail?

The position is well established by authority, that if a plaintiff once take a defendant in execution, and consent to his discharge, he cannot afterwards sue out any execution on that judgment.* There is but one case where a debtor in execution, who obtains his liberty, may afterwards be taken again for the same debt, and that is, when he has escaped; and the reason of that is, because he is not *legally* out of custody. But where a prisoner obtains his discharge with the consent of the plaintiff, he cannot be retaken, it being considered that the plaintiff has obtained a satisfaction in law, by having his debtor once in execution.† This is uniformly the rule where there is but one defendant; and it is equally well settled, that if the plaintiff discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake such defendant, or take any of the others.‡ Where, indeed, the discharge is without the consent of the plaintiff, as by an insolvent law, a different *rule* previals.§ The de-
(53) fendant, in this case, can only be proceeded against, according to the rules laid down relative to bail; who is not chargeable until an execution be first returned, that the principal is not to be found in his proper county; nor can a *sci. fa.* issue until such execution shall have been so returned. Therefore, the judgment on the demurrer must be reversed: And the whole Court gave judgment for the defendant.

*4 Bur. Rep. 2482. 1 T. R. 557. 2 East. Rep. 244.
†7 T. R. 421. ‡6 T. R. 525. §5 East. Rep. 147.

## THE STATE *v.* KEARNEY.

*From Warren.*

In a penal statute, "*or*" will never be construed "*and*," so as to make it more penal.

*Held*, therefore, that under the act of 1816, c. 20, corporal punishment and fine cannot *both* be imposed on a person convicted of a felony, within clergy.

*Held*, also, that the infamous punishment of whipping, therein provided, ought to be restricted to infamous crimes: so that the true construction of the statute is, to refer the fine to manslaughter, and the whipping to larceny and the like.

The prisoner had been convicted of *manslaughter* before *Paxton, J.*, at April Term, 1820, and, after praying the benefit of clergy, which was allowed him, he was sentenced by the Court to pay a fine of two hundred and fifty dollars, and *receive thirty-nine lashes* on his bare back, and stand committed until the fine and costs of prosecution were paid. The prisoner appealed from the sentence, upon the ground that the Court could not, in law, render such judgment.

The case was argued by *Seawell*, for the prisoner, and the *Attorney General*, for the State; but the reporter did not hear the argument.

(54) TAYLOR, Chief Justice, delivered the opinion of the Court:

The legality of the judgment in this case depends upon the construction of the act of Assembly 1816, c. 20; the object of which was to change the punishment of grand larceny and manslaughter. The former punishment was burning in the hand, a relick of ancient barbarism, of little effect in the way of reforming the culprit, or of example to the spectators. It seemed very absurd, too, that a person, convicted of petit larceny, should suffer whipping on the bare back when, if the property stolen was over the value of a shilling, the convict could only be burnt in the hand.

The general rule of the common law was, that the punishment of all infamous crimes shall be disgraceful—as the pillory for every species of *crimen falsi*, as forgery, perjury, and other offences of the same kind. Whipping was more peculiarly appropriated to petit larceny, and to crimes which betray a meanness of disposition, and a deep taint of moral depravity. Lord Coke advises all judges and magistrates to

be very careful how they inflict the pillory on common misdemeanors, and to reserve it only for the more heinous offences—3 Inst. 219—which is a proper caution, when the effect of disgrace on the character is considered, and how much it tends to make a man throw off all moral restraints. The rule of confining infamous punishments to infamous crimes was so generally observed, that the crime and punishment became associated in the mind, and it was formerly thought that the latter, and not the former, disqualified the party as a witness.* Though the law is now settled on better principles, yet, it is nevertheless true, that public corporal punishment for any offence impresses an indellible stigma on the character, and ought to be inflicted on those offences only which are infamous in their nature. It seems to be altogether misapplied to manslaughter, even the high-
(55) est grade of which the law regards as the effect of human frailty; and it certainly has been, and may be again, committed by men, whom neither cupidity nor revenge could prompt to the commission of a base or dishonorable action. The best of men may be overcome by momentary anger, and incited, by strong provocation, to an act of violence before the judgment has time to parley with itself.

If it be said, that the Court will not direct the punishment, but in cases where it is justly merited, the answer is, it is too great a power to be confided to the discretion of any Court, to determine whether a man shall be consigned to infamy or not. It is repugnant to the whole geninus and spirit of our law, in which there is no example of a Court being empowered to decide whether whipping shall be inflicted or not, where the crime is not in its nature infamous. A Court may, in the discretion of the Judge, adapt the degree of whipping to the crime, but the law must have previously designated that species of punishment. And wherever the law has already determined and fixed the nature of the punishment, its duration and quantity must, of necessity, depend on the discretion of the Court, guided by the circumstances of the case.

The words of this act of Assembly may be well satisfied by referring the punishment of whipping to those crimes, with which our feelings and moral sense have been accustomed to connect it; and cannot, without violating its spirit,

* Co. Lit. 6.

be applied to manslaughter. In this respect we think the judgment erroneous. It is clearly wrong in imposing both corporal punishment *and* a pecuniary fine; for the words of the law are in the alternative: "to order and adjudge him or her to receive one or more public whippings, *or* to pay a moderate pecuniary fine, in the discretion of the Court, under all the circumstances of the case." If "or" could, under any circumstances, be construed "and" in a penal law, it must be to lessen, not to aggravate, the evil of punishment.
(56) The judgment must, therefore, be reversed so far as it orders that the prisoner be whipped, and affirmed as to the fine.

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Den on Demise of MURRAY *v.* SERMON.

*From Hyde.*

**If a navigable lake recede gradually and insensibly, the derelict land belongs to the riparious proprietor; but if the recession be sudden and sensible, such land belongs to the State, and, it seems, is the subject of entry under the act of 1777, c. 1.**

The defendant claimed title to the land in dispute under a patent bearing date in the year 1761, in which the boundaries were described as follows: "Beginning at a poplar *on the south side of Mattamuskeet Lake;* thence running west, *with the lake,* 86 poles to a corner; thence different courses and distances to a corner *on the lake* again; and thence, *with the lake,* to the beginning." The lessor of the plaintiff had obtained a grant of late date, covering lands, as he alleged, between the defendant's lines and the lake, which had become dry by the recession of the lake since the patent to the defendant was issued, as stated by the plaintiff. Both sides gave evidence of what had been actually run for the lines of the defendant's land; and it was proved that the lake was a navigable water.

The cause was tried at November term, 1818, before *Hall,* J. while he was on the circuit bench; and he directed the jury, that whether the lake had in fact receded or not, it must still be considered a line of the defendant's grant. A verdict was accordingly found for the defendant; and, upon a rule for a new trial, he ordered the case to be transmitted to the late Supreme Court for an opinion, whether he had misdirected the jury or not.

(57) The case was argued by *Gaston*, for the plaintiff, at January Term, 1820, before the appointment of the reporter, who did not hear his argument.

*A. Henderson*, for the defendant, now contended that the charge of the Court below was right. The case does not state that the recession of the lake was *sudden*, which would be necessary to enable the plaintiff to recover. In the case of such recession only, does the derelict land belong to the sovereign.—*Harg. L. T. 30, De jure Maris; 3 Mass. Rep. 363.* But if the water of the sea, or of a navigable river, recede gradually and by small and almost imperceptible degrees, the increase of the land belongs to the adjacent riparious proprietors.—*2 Roll. Abr. 170; Dyer 326; 5 Bac. Abr. 494*, title, *Prerogative; 2 Bl. Com. 261, 262; 2 John. Rep. 322, 323. Harg. Law Tr. 21.* The case of the *Attorney General* v. *Sir Ed. Turner, 2 Mo. 106*, was decided upon the peculiar wording of the grant, and not on the question, whether the king or the adjacent proprietor owned land formed by the gradual recession of the sea. But, at all events, the plaintiff has no title to the land in dispute. It is not the subject of entry under our law. The act of 1777, c. 1, prescribes that those lands only "which had not been granted by the crown, or by the lords proprietors, or which have accrued, or shall accrue, to this State by *treaty* or *conquest*," may be entered; and these lands were acquired neither by treaty nor conquest.

HALL, Judge, delivered his own opinion, and that of the Court:

I think that I was incorrect in my charge to the jury below, in this, that I directed them to find for the defendant, whether the lake had receded or not; for, in either case, it remained his boundary. Now, if the recession of the lake was sudden and sensible, the land which it had covered, and which, by its dereliction, became dry, would not, and (58) ought not to be included in the defendant's grant. But, if the waters receded gradually and insensibly, the charge would be right, and the lake ought to be considered one of the defendant's boundaries.* It is, therefore, necessary that the fact be found, whether the waters of the lake receded imperceptibly, or not, from the land in dispute;

* 2 Bl. Com. 261. Harg. Law Tr. 5. Dyer 376. Vattell L. N. 193.

because, on that question the rights of the parties depend. And to do that, the rule for a new trial must be made absolute.

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ODOM and others *v.* THOMPSON and others.

*From Bertie.*

In a petition to have a probate of a will set aside, and a reprobate in solemn form, all the heirs at law and distributees need not be made parties. It is sufficient if the petition be brought by one of them, and all the executors, devisees and legatees claiming under the will be made defendants.

This was a petition filed by Odom and others against Thompson and others, in which the petitioners set forth that one Hinton died seized of real estate in fee, and possessed of personalty, and that the petitioners were heirs-at-law and distributees of Hinton; that, after his death, some of the defendants caused a certain paper to be proved in the County Court as his last will, and the persons named therein as executors thereof being dead, obtained letters of administration: and that the other defendants claimed an interest in the said real or personal estates, as devisees or legatees, under the said will. It was also charged, that Hinton was totally incapable of making a will, and that the said probate had been effected *ex parte*, and without notice to the petitioners, and prayed for a solemn probate. The defendants filed an answer, in which they set forth, amongst other things,
(59) that certain other persons therein named were heirs-at-law and next of kin of Hinton, and traced their pedigree, so as to show that fact. The case was set down for hearing upon the petition and answer, and brought up from the County Court to the Superior Court, where it came on for hearing at April Term, 1818, when it was objected, on behalf of the defendants, that a reprobate of the will in solemn form would not be ordered by the Court, unless all the heirs-at-law and next of kin, and all the devisees and legatees, were made parties; and the case was adjourned to the Supreme Court for a decision upon the question, "Whether the petitioners were bound to make any other parties?"

The case was submitted without argument.

TAYLOR, Chief Justice, remarking that the case had been transmitted here under the former organization of the Court,

and, therefore, only the question submitted could be decided, said, as to that question, that all the persons interested in supporting the will are made defendants in the case, and, upon a controversy whether the will ought to be reproved or not, there is no necessity of making any others: and the cause was remanded for further proceedings.

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(60) TYSON *v.* RASBERRY.

*From Greene.*

The acts of 1777, c. 25, and 1782, c. 29. do not apply to cases of burning the woods from necessity, but only to voluntary firing:

*Held*, therefore, that one, who sets fire to woods by necessity, need not take "effectual care," or *any* care to extinguish it, so far as regards the penalty inflicted by those statutes—though he may be liable to an action on the case for the damages actually sustained by another.

This was a warrant for the penalty of twenty-five pounds, under the act of 1782, c. 29, s. 2, for firing the woods. It came on for trial on the *general issue*, at April Term, 1820, when the case appeared to be this: That on the 25th March, the defendant put fire *to his own woods* to burn around a tar kiln, which afterwards communicated with the plaintiff's fence, about half a mile off, and consumed it; that on the morning of the 24th March, a fire was discovered to be burning in the woods about two miles distant, which created some apprehension for the safety of the kiln, and induced the defendant to believe that it would be necessary to burn around it, and that he gave notice to the owners of the adjoining lands of his intention; that the fire in the woods continued to approach the kiln during both days, until it came within a quarter of a mile, and that then, the defendant burnt the woods around the tar kiln for the purpose of saving it; and that, but for such burning, the kiln would have been lost. No evidence was offered to shew that the defendant had taken care to extinguish the fire which he kindled, nor to prove that he had been negligent. The Court instructed the jury, that under the emergency of the case, if the burning around the kiln were necessary to save it, the defendant was not subject to the penalty for the act of setting fire to the woods: but that it was incumbent on him to use effectual exertions to prevent the fire extending to other lands than his own, which the defendant had not

shewn, and, therefore, the plaintiff was entitled to
(61) recover. The jury found a verdict for the plaintiff, for the 25 pounds, which the defendant moved to set aside for misdirection; but it was refused, judgment rendered against him, and he appealed to this Court.

*Gaston*, for the appellant.—The Court below erred, in stating that it was the duty of the defendant to shew that he had used effectual exertions. The plaintiff ought to have shewn the contrary. He cannot recover, unless he prove that the defendant was *negligent:* For it is a general presumption, that every man has conformed to the law; and the presumption stands until it be repelled by proof. To shew that the burden of proof lay on the plaintiff, he cited the cases of *Powell* v. *Milburn*,* *Williams* v. *East India Company*,† *King* v. *Hawkins*,‡ and *Phil. Evid. 150, 151.*

*Seawell*, for the appellee.—All the cases cited on the other side, are those of *officers;* and do not apply, because *they* are presumed to do their duty: Not so with private individuals. They must prove that they have done all that the law requires of them. But that is emphatically the case under these acts of Assembly of 1782, c. 29, and 1777, c. 25, which must be taken in connection. That of '77 makes it *unlawful* to fire the woods, *without first* giving notice *and also taking effectual* care to distinguish the fire. When an act is unlawful *nisi*, that is, when one may not do one thing *unless* he shall have done some other thing before, *he* must *shew* that he has complied. The owner sets fire to his own land at his peril; he must "effectually" extinguish it, before it reaches the land of others. This act ought to be construed strongly against the defendant, for it is a statute for the *repose* and *safety* of others.

(62) *Mordecai*, in reply.—The act of Assembly was intended to prevent persons from setting fire to the woods, as matter of convenience, not when it should be matter of necessity. When no necessity exists, two days notice must be given to adjacent proprietors. But when there is a necessity, it is out of the purview of the statute, and there is no occasion for notice. So it is not only made the duty of him, who sets fire for convenience, to give notice, but he must take *effectual care* to prevent the fire spreading

* 3 Wils. 360. 2 W. Bl. Rep. 852. † 3 East Rep. 192. ‡ 10 IB. 216.

to other lands. But when he is not required to give notice, he cannot, by any sound rule of construction, be required to take this effectual care. This Court has already decided, that notice is not necessary when the burning is by necessity; and the penalty cannot be recovered in any case, where the party is excused from giving notice. When a man intends beforehand to fire the woods, "he has an opportunity of providing the means of taking effectual care;" but when he is pressed by necessity, he has none, and is not liable, on the statute, to the penalty, although he may be to an action on the case for negligence.

TAYLOR, Chief-Justice.—The act of Assembly was evidently intended to prevent a deliberate or a wanton setting fire to the woods, by the owner of land, without giving the requisite notice. It certainly did not contemplate the case of a man's setting fire to his own woods to save his property or his land from the ravages of an approaching fire. To make the firing in such a case unlawful without notice, were to compel a man to become a passive spectator of the destruction of his own property.

It is, then, only in cases where a notice must be given, that the penalty can be incurred for not taking effectual care to extinguish the fire. If a person does not come within the act, he cannot be liable for not doing anything enjoined by it; and the obligation to take effectual care, is imposed on those only who are bound to give notice. There is another reason for this construction. The act requires
(63) *effectual* care to be taken to extinguish the fire; so that the party must extinguish it at all events, otherwise his care is ineffectual and he must pay the penalty. Although this might perhaps be exacted from a person, who is at liberty to choose his own time to set the fire, and who may accordingly provide himself with the aid of his neighbours to prevent its spreading, yet it would be unreasonable to expect it from one who fires the woods from a sudden emergency and in his own defence. Nor is there any necessity for so harsh a construction of the law, for a person injured by the negligence of him who does the act, has a remedy at common law. I therefore think the judgment ought to be reversed.

HENDERSON, Judge.—Were it not for the word "*effectual*" in the statute, I might possibly concur with the Circuit Judge.

But it seems very unreasonable that a man should not be permitted to set fire to his own woods to preserve his own property from destruction, unless he should take effectual means to extinguish the fire—his *best exertions* will not do. If such were the law, the right of property would not be worth possessing. In such a case, it would seem enough for him to repair the actual damages sustained by him who may have been injured; and if the present plaintiff is of that class, let him bring his action for that purpose.

As the defendant is not within the penalty of the law, the firing being from necessity, he need not shew that he took effectual, *or any* care to extinguish the fire: for the last would be unavailing, if he were within the penalty. There is good reason that the endeavors should be effectual in case of a voluntary firing; for, as that is a thing of his own choice, in which he may select his own time, it is not unreasonable to compel a man to see that the means which he provides to extinguish the fire be sufficient for that purpose. That it was a voluntary firing which the Legislature intended to prohibit under a penalty, I think is quite evident from
(64) the provision, that notice should be given. To prevent a man from doing what he is strongly impelled to do by his very nature, is not to be inferred from anything short of plain and evident words; and even if the words would well bear that meaning, and another sensible construction can be given, the latter shall be preferred as the true one. I think, therefore, that the Court erred in instructing the jury, that the defendant incurred the penalty, because he did not prove that he took effectual means to distinguish the fire. In this case, it was not necessary that he should take any means; and I am of opinion that the rule for a new trial must be made absolute.

Rule made absolute.

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BROCKET *v.* FOSCUE.

*From Jones.*

When a deed for land contains an acknowledgment of the bargainor of the receipt of the consideration, and a clause exonerating the bargainee therefrom, it amounts to a release, and is a bar to an action for the purchase money:

In assumpsit for such purchase money, no parol evidence can be received to show that it is unpaid; because it is contradictory to the deed.

BBOCKET *v.* FOSCUE.

**A bargain and sale is good, although the deed does not express that the consideration money *has been paid.***

This was an action of assumpsit, in which the plaintiff declared for the price of a tract of land sold and conveyed by him to the defendant. Upon the trial, it was proved that some months after the deed had been made for the land, the defendant acknowledged that a balance of 200 pounds was still due to the plaintiff, which he was to pay him within two years thereafter. The pleas were, the "*general issue and set off;*" and the defendant, upon the first issue, relied upon the deed, which expressed to be made by the
(65) plaintiff "for and in consideration of one thousand dollars to him *in hand paid* by the said F., *the receipt whereof the said B. doth hereby acknowledge, and thereof doth exonerate the said F., his heirs and executors,*" and insisted that it was a release: but the Court held, that the clause in the deed was not conclusive, and that parol evidence was admissible to show that the consideration money had not been paid. The defendant then offered evidences of payments and sets off, subsequent to the period at which the acknowledgment aforesaid was made, so as to reduce the plaintiff's demand to 117*l.* 10*s.*, for which the jury gave him a verdict. The defendant obtained a rule for a new trial, upon the ground that the Court ought to have instructed the jury that the deed contained a full discharge and release; but the rule was discharged and judgment entered for the amount of the verdict, whereupon an appeal was taken to this Court.

*Gaston*, for appellant.—A release is an absolute bar to the the plaintiff's recovery; and here is one. A release requires no particular form of words: any which declare a renunciation of claim are sufficient.* And acknowledgment, under hand and seal, that a debt is satisfied, is a good release.† Here the deed is express, and any evidence, showing that a part of the purchase money is unpaid, is directly *contradictory* to it, and cannot be received.

*Mordecai*, on the other side, cited *Phil. Ev.* 423, and the cases of *Shepperd* v. *Little*, 14, *John. Rep.* 210, and *O'Neale* v. *Lodge*, 3 *Har.* and *M'Hen. Rep.* 433, which are both expressly in point. He said, too, that it was every day's practice among

* Co. Lit. 264, b. † 9 Rep. 52.

the people to make deeds in that way, without receiving the whole of the purchase money, or taking a separate security by specialty for it, and that it had always been the un-
(66) derstanding of the profession that it could be recovered on the simple contract.

TAYLOR, Chief Justice, after stating the case, said, that the defendant contends that the deed, which contains a receipt and a release, cannot be contradicted by parol evidence. The manifest justice of the claim, and the unconscientious nature of the defence, has made me desirous to ascertain some solid ground of law on which the former can be supported; but I cannot discover how it is to be done, without breaking in upon the rule, that you cannot by parol contradict a deed.

Two cases have been cited where such evidence has been admitted; but they do not quite come up to this, nor are the reasons for the decision satisfactory. It is truly said, that the end of inserting a consideration in a deed is to raise an use, and that the slightest consideration of value is sufficient for that purpose. Still, it is not necessary, for the same end, that a release should be inserted, nor is it, strictly speaking, consistent with the form of a bargain and sale. I may go further, and say, that the use will arise without an acknowledgment of the receipt of the consideration; as if a man bargain and sell his land in consideration of so much money, to be paid at a day to come.* If it be contended, that, although you cannot contradict the consideration so far as it is necessary to the efficacy of the conveyance, yet, for any other purpose, it may be done—it ought first to be shown, that the only indispensible form of stating the consideration is adopted in this deed. The deed may still be effectual with other modes of stating the consideration, by which, if it be not paid at the time, the seller's right to it may be secured and enforced. It might subserve the justice of this case to allow the plaintiff to recover in the face of his deed, but the precedent would be fraught with mischief to the community.

The effect of adhering to the rule of law will only be
(67) to make men cautious in executing deeds; but, if it be understood that a solemn acknowledgment under seal is insufficient to prove the payment of money, it is to be

* Dyer, 337, a.

apprehended that many perjuries will arise. To the cases cited at the bar, I will add one from 5 *Mass. Rep.* 67, where a deed of tenant in tail purported to be made for good and valuable consideration, but in order to get the judgment of the Court on its effect, the parties agreed, in a case stated, that no consideration was paid. Chief Justice PARSONS observed, that if the parties had not expressly agreed that there was no valuable consideration, it would have been difficult to get over the express averments of the deed. There is also a case to the same effect in 1 *Campb. Rep.* 392. So the judgment must be reversed, and a new trial granted.

The Court was unanimous, and the judgment was reversed.

## SPIERS AND WIFE *v.* ALEXANDER.

*From Cabarrus.*

When a *gift* of a chattel is found or stated in a case, a delivery is presumed; because without it, it is not a gift:

And such possession of the donee will be presumed to continue, unless the contrary be found or stated—especially if it appear, that another claimed and exercised ownership *from* a particular subsequent period.

Husband and wife cannot join in detinue for a chattel, if the husband had actual or constructive possession after marriage: For by the marriage and such possession, the whole vests exclusively in the husband.

Detinue for negro slave Violet: pleas, *non detinet* and stat. lim. Upon the trial the title of the plaintiffs appeared to be derived by a parol gift to the *feme* plaintiff, while sole and an infant, by her step-father, J. Means, in whose house she lived at the time of the gift, and afterwards until her
(68) intermarriage with the other plaintiff, which happened before she was of full age, and several years after the gift had been made. The plaintiffs were married at Means', and resided a few days with him, and then removed to Spiers' own house, which was in the neighborhood, and lived there from that time, viz.: 1799, till Means died in 1818. The slave had remained on Means' plantation, with the wife, from the period when she was given until Spiers removed from his house; and from that time Means claimed and exercised the right of ownership over her until he died, when the defendant succeeded to her as one of his next of kin. This suit was brought in April, 1819.

The defendant moved for a nonsuit, upon the ground that the action ought to be brought in the name of the husband

alone; and, also, that the plaintiffs were barred by the statute of limitations; but the Court directed a verdict to be taken for the plaintiffs, with leave to the defendant to move to set it aside, and enter a nonsuit; which was afterwards done, and the plaintiffs appealed to this Court.

It was contended on behalf of the defendant, that the plaintiffs were barred by the *st.* 1715, *c.* 27, *s.* 5, 9, notwithstanding her infancy at the time of her marriage, and her continued coverture since; for there is no saving for *successive or cumulative* disabilities. That question was argued at much length on both sides; but, as the opinion of the Court was not given on it, it is deemed unnecessary to report the arguments.

*A. Henderson*, for the defendant.—Upon the other point, he said that the case stated a *gift;* so that there must have been a delivery to the wife; for there can be no gift without a delivery. The property and the possession were, therefore, in the wife at the time of the marriage; for there is no adverse possession set forth, until that of Means's, several days *after* the marriage. The slave was, therefore, a chose in possession, and vested in the husband upon the mar-
(69) riage. In *Johnson and wife* v. *Pasteur** the possession was adverse at the time of the intermarriage. But here, even if the actual possession be considered to be in Means at the marriage, and not in the wife, it was not then an adverse possession, and was, therefore, the possession of the wife, the bailor, and, consequently, upon the marriage, became the possession of the husband.† Until Mean's adverse possession commenced, the possession would be deemed in the husband; for, unless it be adverse, the possession is presumed to be in him who has right.

*Wilson*, on the other side.—Possibly the husband might sue alone; but he may join his wife. If husband and wife can bring *detinue* at all, and it is now too late to say they cannot, the Court will apply to it the principles which govern *trover*, as to them. And it has long been settled, that where one has the property of *feme sole* in possession by finding, and convert it after marriage, Baron may sue alone, or jointly with the wife. The cases of *Power* v. *Marshall*,‡

* Conf. Rep. 464.

† Armstrong *v.* Simonton, in Sup. Co. Jan. T. 1818. ‡ 1 Sid. 172.

and *Blackborn Greaves*,§ establish that rule; and Chief Baron Comyns so lays it down upon their authority. *Com. Dig. Tit. Baron and Feme*, X. And so here, the husband may sue with his wife, and the fact of his thus bringing the action shews that he has not made an election to have the exclusive property, and, upon his death, it will survive to the wife.

The husband never had actual possession; but only such as one has in property lost, before it is converted.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The only proper conclusion that can be drawn from the statement of the case is, that the slave Violet was delivered to the female plaintiff by Means when the gift was
(70) made for a transfer of possession is implied, since, without it, a gift is not valid. This continued up to the time of the marriage, inclusive, and Spiers, the husband, then acquired, in right of his wife, the possession of the slave, which he continued to hold during the time he remained in the house of Means. It signifies nothing that he left the slave with Means upon departing from his house, for his separate right of action had attached upon the marriage: the property was a chose in possession, and would have devolved upon his representatives, had he died the next day. That Spier's wife, before his marriage, and he afterwards, had possession, is further to be inferred from the fact stated, that Means claimed and exercised an ownership over the slave *from the time* the plaintiffs left his house until his death; from which the implication is necessary, that while the plaintiffs continued at his house, he did *not* claim or exercise ownership over them. The right of Spiers, therefore, was effectually barred in 1802. In the cases heretofore decided, in which it was held, that the wife was properly joined in detinue, no possession in the husband appeared, and he was consequently suing for a chose in action, which, without such possession, would survive to the wife. From this view of the case, it results, that it is unnecessary to decide the other question arising out of the operation of the supervening coverture of Mrs. Spiers upon the statute of limitations.

The judgment was therefore affirmed.

§ 2 Lev. 107.

(71) AUSTIN *v.* RODMAN.

*From Halifax.*

A record is deemed in law authentic beyond all contradiction; and, when regularly certified by the proper officer, it is conclusive upon the plea of *nul tiel record.*

But where a Clerk made an entry, by order of the Judge of the Court, in the record of a cause the day after term, and, at the next succeeding term, a motion was made to strike the same out: *Held*, that such entry is, in fact, no part of the record, and that the Court should order it to be annulled and expunged: *Held*, also, that the affidavits of the party and the Clerk will be heard in support of such motion.

But, by HALL, Judge, although such entry is, in fact, no part of the record, yet, if it appear upon the record duly certified by the Clerk, it is conclusive; and no proof can be heard against it, nor can the *Court order* any alteration in it. As, however, the Clerk wrongfully made it, *he* may expunge it, and restore the record to the truth; and, if he will not, but issues process on it, he will act upon it *at his peril.*

A suit pending between the parties was tried before *Daniel, J.*, at April Term, 1819, in which a verdict for a large sum of money had been rendered for the plaintiff. A rule had been granted on the plaintiff to show cause why there should not be a new trial, returnable immediately; and the counsel of Rodman urged his Honor several times in Court to hear the argument, but it pleased him to defer it from time to time, until late on Saturday evening, and he then said that he would hear it at his chamber on Saturday night. Accordingly, the counsel on both sides and the defendant attended the Judge, and the rule was argued at a very late hour in the night, but no decision was made until *Sunday* morning, when the Judge declared that he would not grant a new trial, and the Clerk made the following entry on the trial docket: "On argument, new trial refused," and judgment was entered. At October term following the defendant, making these facts appear by the affidavit of himself and the Clerk, and swearing also to merits, and that he had been prevented from appealing to the Supreme Court
(72) by the decision not being made in term time, moved for and obtained a rule on the plaintiff to show cause why so much of the record as went to discharge the former rule for a new trial should not be expunged, so as to leave the cause standing upon the rule for the new trial. And this latter rule was returnable to March Term, 1820, when the plaintiff showed cause, and the rule was discharged, and an appeal was taken to this Court.

*Gaston*, for the plaintiff.—The record is now perfect, and cannot be altered. It is not permitted to a Judge to alter or erase any part of a judgment, after the term whereof it is entered.* The Clerks, not the Judges, are keepers of the records: they are bound by bond and oath to keep them truly; and this Court cannot order any alteration; for no earthly power can rightfully compel the Clerk to deface what hath once become a record.

To prevent the mischiefs which may result from the misprisions of Clerks, statutes of amendment and *jeo fails* have been passed. By 14 *Ed.* 3, mistakes of a syllable or letter in process may be amended. *St.* 8, *Hen.* 6, misprisions may be amended, to avoid errors assigned for erasures and interlineations. St. 32, Hen. 8, 18 Eliz. 21, Jac. 1, after verdicts, and in order to sustain judgments thereon, certain errors shall not be fatal. St. 16 and 17, c. 2, after writs of error are sued out, certain omissions of form may be supplied in order to prevent reversal of judgment. But none of the statutes allow an alteration of the record in a substantial part; and, under the statutes, no further amendment can be made than is expressly allowed by them, and only where there is something to amend by.† At common law, amendments cannot be made after term.‡ In modern times, amendments have been more liberally made; but never, except in affirmance
(73) of judgments.‖ And parol evidence will not be received to vitiate a record.¶

It is in violation of every principle of evidence to permit a record to be impeached by parol evidence. In the nature of all proof, there must be something which is final; which not only need not be proved itself, but allows not of proof to the contrary. Such is a record in our law. To permit it to be expunged, erased in part or in whole, on motion and on parol evidence, is to make it yield this preference, and is, in effect, to abolish the rule, which gives absolute verity to a record. But if it can be done in any case, it cannot upon the proof now offered. What is the proof? Rodman's own affidavit! which is to do away a judgment, and, with the motion founded on it, operate as a writ of error. As to that of the Clerk, it cannot be received. If the act done be wrong, the

* Co. Lit. 260, a. 4 Inst. 255. 4 Rep. 52. Blackmore's case, 8 Rep.
† Tid. Pr. 661. ‡ Id. 651.
‖ Bac. Abr. "Amendments," F.
¶ Dickson *v.* Fisher, 1. Wm. Bl. Rep. 664. 4 Bur. Rep. 2267.

affidavit of the very agent cannot be admissible to show it. Surely *he* shall not be heard to prove himself guilty of the turpitude of making a false record, of forging "the solemn memorial of a Court of Justice," whose rolls are confided to his custody. He stands upon the same ground as a juror, whose affidavit will never be received to impeach his verdict.* But policy still more forbids the admission of the evidence of a Clerk than a juror, because the temptation to tamper with them is so great. Hence, officers are never permitted to be examined as to the matter of a record.† The case rests, therefore, upon Rodman's own evidence; and if the motion be allowed upon *that*, the precedent will be dangerous, and few judgments will stand against the affidavit of the parties. The plaintiff cannot contradict the affidavit, because the counsel, of course, will not, and the Judge *ought* not; and there are no other persons who could know.

(74) Everything ought to be presumed in favor of the regularity of the proceeding. It is complete on the face of it; and the Court will infer that all was done by consent; that the Judge *decided* during the term, though the record was made up afterwards. The practice now complained of has the sanction of universal usage: it is the common practice of all the Judges, adopted for the convenience of counsel and suitors, and ought to be supported, and would justify entering up the judgment *nunc pro tunc*, even if the present one can be vacated. Judgments signed in vacation, as of the preceding term, when consistent with the rules of proceeding, are perfectly regular.‡ In *Slocumb* v. *Anderson*,§ the parties waived an inquiry into the regularity of the proceeding, and submitted certain points only to the Court upon which an opinion was given. But even there, no motion was made to expunge, alter, or deface a record.

*Seawell* and *Mordecai*, for Rodman.—The affidavits must be taken to be true. There is no counter-affidavit, nor any conflicting evidence. We know that a record is indisputable; and that is the very reason we now apply for redress. For we say, this is no record, though it appears to be one. The cases cited on the other side are all of matters done or performed during the term. But the question here is, whether

* 1 T. R. 11. 4 John. 487. 1 Bos. & Pul. New Rep. 324. 4. Bin. 150.
† Leighton *v.* Leighton, 1 Stra. 210.
‡ 2 T. R. 40, S. § 1 Law Rep. 466.

the Clerk can make a false record, by addition or diminution, in vacation, so as to bind the rights of others? The danger lies on this, instead of the other side; and there will be no check upon the errors of a Judge, or the corruption of a clerk, if the truth cannot be shewn and the record corrected. It is not an attempt to give evidence against a record upon a question arising under it on a trial. It is only an endeavor to restore its true character to it, and make it, in fact, the record of *what was done by the Court.* Unless this can be done, the party is effectually ousted of his appeal; because
(75) he departs, with the end of the Court, in fact as well as in legal implication. But as the defendant has merits, which must now be presumed, and has been defeated of his appeal, the Court will aid him, if possible: and this can certainly be done now upon the common principle of *nunc pro tunc.** *Slocumb* v. *Anderson* is a much stronger case than this; for there everything was done by consent.

TAYLOR, Chief Justice.—A record a memorial of a Court of Justice, which the law deems authentic above all contradiction. Its purity ought, therefore, to be guarded with anxious vigilance, lest any entry should go forth to the public as the act of a Court, which has not in reality become such according to the forms of law. The certificate of the Clerk, as to the truth of a record, would have been conclusive upon the issue of *nul tiel record,* and parol evidence to prove that it had not regularly become such, would have been inadmissible. Yet, when the inquiry is now made as to the manner in which this apparent record was made up, it appears, most satisfactorily, that the entry was made by the Clerk after the expiration of the term, and that the judgment was, in fact, pronounced by the Judge after the right to do so had ceased. This is known to be frequently done, and for the purposes of justice and the convenience of suitors, under the best intentions on the part of the Judge; but still it cannot stand the test of legal examination. The effect of such a precedent might be most mischievous, if the entry of a Clerk, made upon his records after the term, were allowed to bind men's rights and property to any extent. Whereas, few inconveniences can ensue from making the record speak the truth, provided an inquiry be instituted

* 6 T. R. 1. 5 do. 577. 7 do. 474.

recently after the entry complained of has been made. In the case of *Slocumb* v. *Anderson*, there was the consent of all parties, and the intent of the transaction was perfectly fair; but inasmuch as the judgment was entered up in va-
(76) cation, it was held to be a nullity, and the entry on the record ordered to be vacated. That case is an authority for a like order in the present one. The judgment must be reversed, and the entry of the Clerk, made after term, be annulled and expunged.

HALL, Judge.—Lord Coke says, that "records, being the rolls or memorials of the Judges, import in themselves such incontrollable verity and credit, that they admit of no proof or averment to the contrary. Insomuch that they are to be tried only by themselves; for, otherwise, there would be no end of controversies. But during the term wherein any judicial act is done, the roll is alterable in that term, as the Judges shall direct. When the term is past, then the record admitteth of no alteration, or averment or proof that it is false." Co. Lit. 260, a. 4 Rep. 52. If this be the legal definition of a record, the entry here, that "on argument, a new trial was refused," and the judgment of the Court consequent thereupon being made on Sunday, after the expiration of the term, as the affidavits state is the fact, forms no part of the record of the suit between the parties. If it should be so considered, any entry made in vacation must be considered in the same light; which, in the words of Coke, would give rise to innumerable controversies: and where a Clerk certifies entries so made, he certifies that as a record, which, according to the same authority, is not a record. This is an answer to the affidavits. But a record is certified by the Clerk in due form, and it is required that we should direct the Clerk to alter it upon the strength of those affidavits. That, I think, we cannot do. The record appears to be perfect; and it can only be tried by itself. But we can advise the Clerk, that if he made it up as he himself states in his affidavit he did, it is no record; that he is to consider nothing as the record between the parties but what was entered *in term time;* and that as *he* did wrong in making the entry, *he*, and
(77) not we, may correct it by expunging from the record that which really never belonged to it. When this alteration shall be made, the truth will be seen, and the rule for a new trial will remain undisposed of. But if the entry

made on Sunday be considered as disposing of that rule, it may also be considered as an authority for him to issue execution on the judgment obtained, which, surely, cannot be; for the rule for a new trial was obtained in term time, and is a record, and the discharge of it was entered in vacation, and was not a record; and, therefore, the question, whether there shall be a new trial, still remains open. If the Clerk should issue execution, he will do it at his peril. *His* better way is to expunge from the record book any entry that was made after the expiration of the term.

MURPHEY, Judge, sat in the place of Judge HENDERSON, who had been of counsel in the cause at the bar. He concurred in the opinion given by the CHIEF JUSTICE.

So that the decision of the Court below upon the last rule obtained by the defendant at October Term, 1819, was *reversed;* and this Court *ordered* the said entry of the Clerk, made after the expiration of April Term, 1819, to be *annulled* and *expunged.*

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(78) THE STATE *v.* YARBROUGH.

*From Franklin.*

To an indictment for an assault in the Superior Court, the defendant pleaded in abatement, that a prior indictment was still pending against him in the County Court for the same cause: *Held*, that the plea is good; for the Courts have concurrent jurisdiction, and to avoid the mischief of having two indictments carried on for the same cause against the same person, the jurisdiction shall attach in the County Court by the prior finding of the bill, and shall exclude that of the Superior Court, except in its appellate capacity: *unless* it be shewn that the first is carried on by fraud and covin; which may be replied by the State to such a plea.

There is no method by which an indictment can be removed from the County Court to the Superior Court for trial, but by appeal after a final decision.

Where upon words of reproach on both sides between Y. and B. the latter approached the former, and struck him a violent blow with his fist, which staggered him, and the company separated them, and were taking B. away, when Y. within one minute, advanced upon B. who extended his arm to take hold of him, and Y. immediately stabbed him with a knife, which he had not shewn before: *Held*, that if death had ensued, it would not be *murder*, but *manslaughter*, notwithstanding the separation for a minute and the weapon; for the wrath of the accused, kindled in the highest degree by the blow, would not reasonably subside within that period, and, in such case, the instrument makes no difference.

***Necessity*** **distinguishes between manslaughter and excusable homicide, and not between the former and murder. Its absence is common to both murder and manslaughter.**

This was an indictment, containing two counts: The first for an assault on one Benton, with intent to kill and murder; and the second for an assault only. The defendant appearing, pleaded in abatement, that before the filing and finding of this indictment, he was indicted in the Court of Pleas and Quarter Sessions for Franklin county for the same cause and acts upon which this indictment is founded, and that said indictment is still pending, and that the County Court hath jurisdiction of the case.

(79) To this plea, the Attorney-General entered a general demurrer, in which the defendant joined; and, upon argument, the Court sustained the demurrer. The defendant, being allowed to plead over, pleaded "not guilty," and, on issue joined, the case came on for trial at October, 1819.

The prosecutor and several witnesses stated, that the defendant came up in front of the prosecutor in a menacing manner, but with his hands in his breeches pockets, when the prosecutor raised his hands to push him back, and the defendant immediately stabbed him with a knife in a vital part of the body, and that the wound was likely to produce death.

One W. Taylor, at whose house the affair happened, proved on behalf of the defendant, that Benton and a brother of Yarbrough were in conversation relative to some part of the defendant's conduct, who was then absent, but came up soon afterwards, and the brother then said to the prosecutor, "Now tell him to his face, what you have to say of him." Yarbrough seated himself in a chair in the porch, where the company was, and remarked to Benton, that there was no occasion for casting flouts on him, and that he wished for peace. They continued to talk, until words of reproach were used on both sides, when Yarbrough rose and stood up, and Benton came up to him, and struck him a violent blow with his fist, which staggered him, though it did not knock him down. The company immediately interfered, separted them, and were attempting to carry Benton into an adjoining room, when Yarborough advanced up, and the prosecutor extended his arm to take hold of him, and immediately the traverser stabbed him. The witness further said, that he did not see

nor hear anything of a knife until the stab was given; and that it was about one minute after the blow had been given by Benton.

The counsel for Yarbrough moved the Court to instruct the jury, that, according to the evidence of Taylor,
(80) if believed, if death had ensued, it would have been manslaughter only. But the Court refused to give such instruction; and charged the jury that it would have been murder, inasmuch as the parties were then separated, and there was then no necessity on the part of Yarbrough to stab the prosecutor. Under this instruction, the jury found the defendant guilty. He moved for a new trial upon the score of misdirection, which was refused, and he appealed to this Court.

*Seawell* and *Gaston*, for the appellant.—The question upon the plea in abatement and demurrer is now open; for this Court must look into the whole record, and give such judgment as the Superior Court ought. Spurrier's case, 5 Rep. 61. The plea ought to have been sustained. It is a maxim of common right that no man shall be twice vexed for the same cause; and if a second action be brought, pending the first, it shall be abated upon plea. There is nothing in the nature of criminal prosecution which renders the evil of a double prosecution more tolerable than in civil controversies; but decidedly the reverse. It is true, that in England, it is not a good plea, that another indictment is pending for the same cause; but the reason of that is, that there are no conflicting jurisdictions, and all the evils that might result from them, or from double indictments, are remedied by easier and more summary methods than by plea. The Court of King's Bench is the Court of universal criminal jurisdiction. and there is none other (4 Bl. Com. 265, 321), for although indictments may be found before other tribunals, they may be all removed into that Court by *certiorari*. And when the case is there, although no plea of *auter fois arraign* will be allowed, the Court will take care that justice shall be done, and the defendant not unnecessarily harassed, and will *quash* the first indictment before the defendant will be put to plead on the second. Foster Tr. 106. And
(81) the same rule was adopted afterwards in *Rex* v. *Webb* (3 Bur. Rep. 1486); and moreover the Court would not allow the prosecutor to proceed upon the second indictment

at all, unless upon the condition that it should assume the place of the former, and everything stand in *statu quo*, as though the one were merely an amendment of the other. But here the indictments are pending in Courts of *concurrent jurisdiction*, and the Superior Court cannot issue a *mandamus* to the County Court, or otherwise control its proceedings, until a final decision shall have taken place, and the case be removed by appeal. Thus, if the plea be overruled, two prosecutions for one and the same thing may be going on at one and the same time; and if nothing short of an acquittal or conviction can be pleaded, the defendant must incur double costs, enter into double recognizances, and run a double risk of imprisonment before conviction. There is no other mode of relief than by pleading in abatement, for he cannot plead an acquittal or conviction after "not guilty"—they are pleas in abatement, and must be before plea in chief. 1 Chitty, 355, 436. But, as the jurisdictions are concurrent, the cognizance of the cause by one ought surely to prevent the interference of the other. Otherwise there will be perpetually an indecent scramble for jusisdiction; for it would certainly be highly indecorus to see the Judges of one Court and the Magistrates of the other running a race in the exercise of their jurisdiction. Hence, in all cases of concurrent jurisdiction, the jurisdiction attaches and becomes exclusive in him who takes the first step—not him who can try first. *Rex* v. *Sainbury*, 4 T. R 451. The objection to this plea can only be founded on a suspicion of the County Court; but the Legislature hath constituted that a competent tribunal, and it is not for any other authority to gainsay it.

(82) The *Attorney-General* and *Williams*, on the other side.—Nothing short of a complete acquittal or conviction upon a sufficient indictment is a good plea. *Vaux's case* (4 Co. Rep. 45). So in *Withipole's case* (Cro. Car. 147), it was held that "*auter fois arraign*" is no plea; for before he is acquitted or convicted, he may be arraigned upon another indictment. And the case of *Regina* v. *Goddard* (2 Ld. Raym. 920) is express that it is not a good plea in abatement, that another indictment is pending for the same cause. So here the plea is, that the indictment in the County Court was pending—it does not even state that the accused had been arraigned on it or pleaded. The criminal justice of the country may and will be evaded, if this plea be held good. Persons guilty of high misdemeanors will procure their

friends to commence a prosecution in the inferior Court, where it is notorious that the most hardened and violent offenders are suffered to get off with very inadequate punishment. None of the inconveniences pointed out on the other side can happen; because the Court, upon motion and a proper case, will stay the proceedings upon the second indictment until the prosecutor can move the Court below to quash the indictment pending there, or apply to the attorney for the State to order a *nolle prosequi*. On the other hand, there will be a great evil; for the Superior Court will be defrauded of its whole jurisdiction over misdemeanors.

The counsel for the accused did not say anything upon the other question; and the Attorney General declined arguing it.

TAYLOR, Chief Justice, delivered the opinion of the Court, which was composed of himself, HALL and MURPHEY:

The first question relates to the validity of the plea, which is demurred to. It must be assumed upon the pleading,
(83) that the first indictment was prosecuted in good faith, and with the view of bringing the defendant to trial. There is truth in the remark made by the counsel for the State, that public justice may be sometimes evaded by an offender procuring a friend to indict him in the County Court, where a trivial punishment would secure him from another prosecution in the Superior Court. While the first indictment is pending, and before judgment, the evil arising from a fraudulent prosecution may, in general, be obviated by replying that the indictment was prosecuted by fraud and covin between the prosecutor and the defendant, and the verification of this fact before the jury would destroy the validity of the plea.

It is a familiar rule of law, that a man cannot bring a second action for the same cause, for which he has a prior action depending. This extends to *qui tam* actions, where the plaintiffs are different, if the cause of the actions is the same—to informations *qui tam*, and to indictments to recover forfeitures on penal statutes; but informations and indictments for crimes are excepted from it. That the rule should not extend to those modes of prosecution, the consequences of which are most grievous to the accused, seems at first view to be unjust, and in conflict with the maxim, *Nemo bis debet*

*vexari, si constet curiæ quod sit pro una et eadem causa.* This anomaly in the English law is only to be accounted for by the extensive criminal jurisdiction of the King's Bench; for it was formerly thought that no acquittal in any other Court could be effectually pleaded in bar to a prosecution in the King's Bench. Into that Court indictments may be removed from all inferior Courts by writ of *certiorari*, and are thus under its control for all the purposes of justice.

If there be any Criminal Courts of local and independent jurisdiction, from which an indictment could not be removed into the King's Bench, that Court would, I apprehend, be compelled by the reason and the rule to sustain such a plea as the one now relied on. This may be inferred from
(84) a passage in *Hawkins:* "If an appeal be commenced before Justices in Eyre, and afterwards another appeal be brought in King's Bench, it will be a good plea, that another appeal is depending; which shows that the King's Bench ought not, without a *certiorari*, to intermeddle in an appeal whereof another Court is legally possessed before; *and the reason seems to be the same as to indictments.*"

The county and Superior Courts of this State have concurrent jurisdiction of the offence charged in this indictment; and where the jurisdiction of the former attaches, it must be exercised throughout, before the Superior Court can take cognizance of the case, and then it can act only in its appellate capacity. There is no method by which an indictment can be removed from the county to the Superior Court, before trial; so that if a party were precluded from pleading the pendency of another indictment, he might be not only *bis vexatus*, but *bis punitus, pro una et eadem causa.* This reason is sufficient to show that the plea ought to be sustained.

With respect to the exception taken to the charge of the Judge in relation to Taylor's testimony, it seems to me to be incontrovertible, that if death had ensued, it would have been a plain case of manslaughter. The defendant received from the prosecutor a blow so violent as to stagger him; and in a minute afterwards gave the wound. We deem such a provocation a legal one; and the law presumes that it may kindle wrath in the highest degree, so that a person is rather to be considered as acting under the suspension of reason, than from the impulse of malice. The homicide would have been not the less extenuated, because he used a deadly

weapon, since the passion, excited by an attack on his person, was continued to the moment of the act.

The jury were incorrectly instructed, when they were told, that it would have been murder, because there was *no necessity* on the part of the defendant to do what he did.

(85) The task was to distinguish between murder and manslaughter; but the absence of *necessity* is common to both of them. Had such necessity existed, it would not have amounted even to manslaughter. In considering whether a homicide amounts to manslaughter or is excusable, the inquiry as to the necessity of it would have been all important; and had the Judge been called on to instruct the jury, that it would have been no more than excusable homicide, he might properly have refused to give such instruction, and for the very same reason that is given for calling it murder.

I am consequently of opinion, that upon both grounds the judgment must be reversed; and the demurrer to the plea in abatement overruled, and the plea sustained.

So the plea was sustained.

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## RAMBAUT, GERNON & CO. *v.* MAYFIELD & DAVIS.

*From Warren.*

IN EQUITY.

R. being a creditor of D. by bond, files his bill against D. & M. charging that D. had fraudulently conveyed property to M. sufficient to pay his debt, and praying a discovery, account and satisfaction. *Bill Dismissed* upon hearing, because R. had not reduced his debt to a judgment, and actually issued execution.

The bill charged that the defendant, Davis, was indebted to the complainants in a large sum, by bond, that was then fully due, and after the said debt was contracted and had fallen due, the said defendant had conveyed all his real and personal estate, and assigned choses in action to Mayfield, the other defendant, fraudulently, and to a much larger amount than would discharge complainants' demand, and that Davis owned all the said property at the time they trusted him,—and prayed for a discovery and an ac-

(86) count, and that they might be paid their debt out of the estate and effects so conveyed and assigned to Mayfield.

Both defendants answered, and denied the fraud; and the cause, being set down for hearing after testimony taken, was transferred to this Court for trial.

Upon the hearing, it was now, by *Mordecai*, for the defendants, objected, that complainants could get no relief upon this bill, as it appeared that they were creditors of Davis by bond only. Before they can come here even for discovery, they must reduce their debt to a judgment and take out execution, so that it may appear, in that way, that the debt is just and that satisfaction cannot be otherwise had from Davis: And to that effect, he cited the cases of *Angel* v. *Draper*, 1 Vern. 399; *Sherly* v. *Watts*, 3 Atk. 200, and *Hendricks* v. *Robinson*, 2 John. Ch. Rep. 296.

And for these reasons, PER CURIAM, the bill was dismissed with costs; but without prejudice to complainants' bringing another suit.

MURPHEY, Judge, sat for HENDERSON, Judge, in this case.

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(87) PRICE *v.* SYKES AND ISLES.

*From Halifax.*

IN EQUITY.

I. made a deed to S. for land, which was destroyed before registration by a combination of I. and S. to defraud a creditor of S. and afterwards, but before the act of 1812, c. 4. the land was sold, under an execution against S. who was present at the sale, and declared the land was his, and urged P. to buy it, who accordingly did purchase it:

*Quere*—Did the *legal* title of the land pass by the sheriff's sale? *Held*, that it was unnecessary to decide that here; because P. had no means of shewing it at law, as the deed was destroyed, and that gave him the right to resort to equity: *Held also*, that he might do so, after an ineffectual attempt to defend himself at law against I.: *Held also*, that if S. was only the equitable owner, his conduct at the sale would constitute P. his assignee in equity, and authorise him to call for the legal title:

*Infants*, who prosecute an unjust claim at law, and thus compel the defendant there to come into equity for an injunction and relief, and who here again set up an inequitable defence, *shall pay costs.*

The bill stated, that one Crawley, being seized in fee of the land in dispute, bargained, in 1805, with the defendant Sykes, for the sale thereof at a stipulated price, which was secured by the bonds of Sykes, and one Hawkins, as his

surety, and also by retaining the title of the land; that he gave Sykes a bond to make him a deed, when the purchase money should be paid,—that Sykes paid a part, and that in 1808, Crawley obtained against him and Hawkins a judgment for the residue of the purchase money; that execution was issued and the land was sold, when Rhodam Isles became the purchaser at a small sum, and took a sheriff's deed, and Hawkins paid the balance; that the purchase of Isles was fraudulent, for Sykes, in fact, furnished the money secretly, and also transferred to Isles the bond given by Crawley for the title, who then, by the consent of Sykes, made a deed to Isles; that Sykes continued in possession, sold part of the land to one Gammon, and received
(88) the purchase money, though Isles made the deed, and that, finally, in 1809, Isles secretly conveyed by deed, the balance of the land to Sykes, except thirty acres which adjoined Isles' own land, and which he proposed to pay Sykes for and keep; that Sykes being still indebted to Hawkins, and wishing to delay the payment or defeat the debt, it was afterwards agreed between him and Isles, that the deed should be burnt, and that Isles should convey again at some future period, and the deed was accordingly destroyed,—that Hawkins sued Sykes in 1811, for the money which he had paid as his surety as aforesaid, and obtained judgment, on which execution issued, and was levied on the residue of the land, viz. sixty acres, described in the bill by metes and bounds, and including the 30 acres which Isles had wished to keep, and the same was purchased by the complainant, who took a deed from the sheriff therefor, and immediately actually entered into the land by the permission of Sykes, who was present at the sale, and urged the complainant to purchase, expressing much anxiety that it should bring enough to satisfy Hawkins, and declaring that Isles (who was then lately dead) had never paid anything for the land, and had no just claim to it, but held it in trust for him; and Mary Isles, the widow, and Lenoir Isles and the other defendants, (some of whom were infants) heirs at law of Rhodam Isles, brought ejectment against complainant, and recovered, because the court of law refused to hear evidence of the foregoing facts, inasmuch as they would not constitute a legal title, by reason of the deed from Crawley to Isles, and the destruction of that from Isles to Sykes. The bill then continued a prayer for an injunction, that

Sykes and Isles should convey to complainant, and that he should be quieted in possession.

Upon the filing of the bill, the injunction was issued.

Sykes did not answer, and the bill was taken *pro confesso* against him.

(89) The answer of the other defendants admitted the contract between Crawley and Sykes, the bonds for the purchase money and that for the title, and that Isles had purchased under the judgment and execution, charged in the bill, and stated that Isles doubted whether the Sheriff's deed was a good title, and, therefore, by Sykes' consent, he took a deed from Crawley. It wholly denied that Sykes furnished any part of the purchase money, or that the purchase was in trust for him. It insisted also that Isles took possession and held it during his life, and that, although Sykes occupied a part of the land, he paid rent. It denied that Isles made any secret or other deed to Sykes, or ever agreed to do so. It admitted that a part of the land was sold to Gammon; but they say that Isles sold it, made the deed, received the consideration, and held it to his own use. The defendants also insist, that Sykes had fraudulently surrendered the possession which he held under them to the complainant.

Upon the coming in of this answer, the injunction was dissolved, and the defendants, lessors of the plaintiff at law, were put into possession under a writ of possession. But the cause was continued, as upon an original bill; and the testimony being completed, in numerous depositions, the case was sent to this Court for trial.

It was much debated upon the facts, by Gaston, for complainant, and by Seawell and Mordecai, for the defendants, Isles, before the jury, to whom issues were submitted. The jury, however, found that the purchase by Isles was made with Sykes' money, and in trust for him; that Isles afterwards made a deed to Sykes, which was destroyed, as charged in the bill; and that complainant bought at the Sheriff's sale by the consent of Sykes, who then represented that the land belonged to him.

Upon this state of the case, *Mordecai* moved to dismiss the bill. If the complainant purchased a legal title, he might have availed himself of it at law; if Sykes' title be an (90) equitable one, then it did not pass, because the sale

was before the act of 1812, c. 4. The legal estate did pass, and, therefore, the bill must be dismissed. If the deed from Isles to Sykes was registered, it is clear that it conveyed the land. If it was not registered, which probably we must now consider to be the case, (as the contrary is neither charged nor found) the question arises, whether registration is necessary to pass the title to lands?

I am informed that Chief Justice MARSHALL, in *Hamilton* v. *Sims*, in the Circuit Court for the North Carolina District, decided that registration is only necessary for the purpose of notice; but that between the parties, the deed takes effect by delivery, and is valid without registration. In conformity with this, Judge Hall decided a case on the circuit at Northampton. The cases of bills of sales of slaves, upon the act of 1789, c. 59, are in point. The act declares unless they be proved and recorded, *they shall be void;* but as it was apparent that the ceremony of recording was only to give notoriety to sales of slaves, sales were held good between the parties without it. So the words of stat. 1715, c. 38, are, "that no conveyance of lands shall be *good and available in law*, unless they be acknowledged or proved and registered." There can be no reason why these expressions, of the same import and enforced by the same sanctions, should receive a different interpretation.

The title did not revert to Isles by the destruction of the deed. The right to a thing, which lies merely in grant, is destroyed by the destruction of the grant: but but when the thing exists independent of the deed, and the deed is but evidence of it, the destruction of the deed does not affect the thing which is the subject of it. Gilb. L. Ev., 95. The plaintiff ought, therefore, to have defended himself at law. If he could not do it effectually, he should have applied to equity for relief pending the suit. He cannot take both chances—
first at law, and, if that fail him, then come into this
(91) Court. 1 Dick. Rep., 287, 313. He, however, does not
allege that there was any obstacle at law, except that the Judge rejected his evidence. If the Judge did right, he has no cause of complaint; if wrong, it is not for a Court of Equity to correct the error.

If Sykes had only an equity, the writ of *fi. fa.* could not reach it. The creditor ought to have taken out his execution, and then applied to equity against the debtor and the

holder of the equitable fund for satisfaction. The necessity for this arises from the inefficacy of the execution. Then nothing passed by the sale, in this point of view.

The jury have found, that Price purchased by the assent of Sykes, who encouraged him to buy. But the bill does not allege that he bought *from* Sykes, nor from the Sheriff as his agent; but it states, that the sale was upon *execution*. The Sheriff, therefore, acted as the officer of the law, and not as Sykes's agent.

*Gaston*, on the other side, was stopped by the Court.

The Court having thus intimated an opinion, Seawell contended, that if complainant got a decree, he could not recover costs. The defendants are heirs-at-law, having no knowledge of the facts upon which the equity of Sykes and Price rested, and some of them are *infants*, who are not to blame for the defence set up here, or the claim asserted at law for them by their next friends. Infants never pay costs. 3 Atk., 223; 1 Hayw., 371.

TAYLOR, Chief Justice, delivered the opinion of the Court:

Whether the complainant had a legal title to the land for which he was sued, it is unnecessary to decide; because he was unable to establish it upon the trial at law, in consequence of the destruction of the deed, which was
(92) effected by the fraudulent combination of Sykes and Isles. That gives this Court jurisdiction, and his remedy is properly sought here. With respect to the other thirty acres, Sykes was the equitable owner, and might, for a valuable consideration, assign his equitable title to Price, who, purchasing *bona fide*, could compel Isles to convey to him the legal title.

When, therefore, Price became the purchaser at the Sheriff's sale, at the request of Sykes, and after his declaration that the land belonged to him, he stood upon the ground of an assignee, and is well entitled to a deed.

With respect to the costs: they ought to be paid by the defendants, since they prosecuted an unjust claim at law, and have set up an inequitable defence in this Court. In such case, the infancy of the defendants forms no excuse.

The Court consisted of the CHIEF JUSTICE, HALL and MURPHEY, and the *decree* was, that the defendants, who were of

full age, should immediately execute a conveyance to complainant for the whole tract of sixty acres, with covenants of title as against themselves and those claiming under them; that the infant defendants should, within one year after full age, execute similar conveyances respectively; that complainant should forthwith be let into possession, and be quieted therein, and an account of rents and profits was ordered; and that defendants should pay all costs at law and in equity. Reserving to the *infants*, six months after full age and service of the decree, to shew cause against it.

(93) ARMSTRONG *v.* WRIGHT.

*From Duplin.*

The refusal of an inferior Court to allow pleadings to be amended, or to continue a cause, or any other exercise of a mere power of discretion, *held* not to be an error, for which the *judgment* will be reversed on appeal or writ of error.

[Nor is it an error to refuse a new trial, which is moved for on the ground that the verdict is *against evidence.*—In Note.]

Debt on bond. Plea, *non est factum* and issue. After the cause had been pending some time and stood for trial, the defendant moved the Court on affidavits to amend by adding the pleas of *infancy* and the statute against *gaming*, which was refused, and a verdict taken, and judgment rendered against him on the pleadings as they then stood. The defendant appealed to this Court, upon the ground that the Court erred in not allowing the amendment.

The cause was argued at some length by *Henry*, for the appellant, and *Mordecai*, for the appellee, on the power of the Court below to admit the pleas, and the propriety of it; but as the opinion of the Court did not turn on it, their arguments are omitted.

*Mordecai*, however, objected that amendments were matters of discretion, and that appeals could not be taken for a refusal of them.

HENDERSON, Judge, delivered the opinion of the Court:

I think this Court cannot look into the question arising upon the motion to amend, for two reasons: the first is, that it is a question of discretion; and in all cases of discretion,

as much is confided to the inferior Court as to the Superior Court. The second reason is, that the very act of vesting a *discretionary* power proves, that the subject matter depends on such a variety of circumstances, where each shade may make a difference, that it is impossible to prescribe
(94) any fixed rules or *laws* by which the subject can be regulated. And although it be said that a sound discretion means a legal discretion, yet, when we ask what the legal discretion is, we are as much at a loss as we were before the definition, to declare the rules or laws by which the discretion shall be regulated. To prescribe fixed rules for discretion, is at once to destroy it.

This opinion is very much supported by the practice in England. I do not know a single case where any decision, depending on discretionary power, has been the subject of a writ of error; and I think that the power of this Court to correct errors in law, extends not to those errors which may be committed in the exercise of a discretion, but only to those where the fixed and certain rules, emphatically called *laws*, are mistaken.

To entertain this question, would compel us to take notice of questions on motions to continue, and all other collateral questions arising in the progress of a cause: a full view of which can never be taken from the abstract facts put down upon the record. Besides, the delay and the inconvenience of unravelling and undoing all that had been once done in the Court below, after the decision of the point complained of, would overwhelm any good arising from the interference of this Court. We are not unapprised that the Court of Appeals of Virginia entertain jurisdiction even in cases of continuances. There may possibly be something in the constitution of their Courts which warrants it, but there is nothing in ours.

Without looking into the motion for the amendment, we think that the judgment of the Superior Court must be affirmed.

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NOTE.—With this opinion of JUDGE HENDERSON corresponds the case of *The Marine Insurance Company* v. *Hodgson*, 6 Cranch, 217, in which the opinion of the Court was expressed by LIVINGSTON, Judge, in these words: "The Court does not think that the refusal of an inferior Court to receive an additional plea, or to amend one already filed, can ever be assigned for error. This depends so much on the discretion of the Court below, which must be regulated more by the particular circum-
(95) stances of each case, than by any precise and known rule of law,

and of which the Superior Court can never become fully possessed, that there would be more danger of injury in revising matters of this kind, than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause; but in neither case can the party be relieved by a writ of error, (that is, if the motion for a new trial be because the verdict is against evidence.) Nor is the Court apprised that a refusal to amend was ever made the subject of complaint in this way." And in *Woods* v. *Young*, 4 Cranch, 238, the Court asks, "Has the party, *by law*, a right to a continuance? Is it not merely a matter of favor and discretion?" And they decide that a refusal to continue cannot be assigned for error. See also the case of *Mar. Ins. Company* v. *Young*, 5 Cranch, 187.

The Reporter will be excused for these references, by the contrariety of opinion and practice among the profession upon this question in different parts of the State.

## COBB *v.* WOOD.

After a term at which a cause was decided, the Supreme Court will not amend the judgment *nunc pro tunc* on the motion of one party without notice to the adverse party: But upon such notice, the amendment will be allowed.

In this case, a judgment had been rendered against Wood, the defendant, in the Court below, which, upon appeal by him, was affirmed in this Court at May Term, 1819. The record, by some omission of the Clerk below, did not state the precise sum of the recovery and costs, so that execution could not be issued from this Court.

*Gaston*, for the appellee, moved now to enter it *nunc pro tunc*, and he had brought up the whole record.

*But the Court* said, that the parties were now out of Court, and it would be a dangerous practice to allow it, as a (96) spurious record might be brought up, or the judgment may have been satisfied. And the motion was refused.

At a subsequent day, *Gaston* renewed his motion, having in the mean time served the appellant with notice of it, and he not appearing to oppose it, it was allowed, and the judgment for the specific sum entered *nunc pro tunc*.

## GRIFFIN *v.* GRAHAM AND OTHERS.

*From Johnston.*

IN EQUITY.

Moses Griffin made his will, containing the following devises and bequests: "I appoint E. G., W. G., etc., trustees of my estate, and executors of my will. I give the remainder of my estate" (after certain legacies and payment of his debts,) "to my said trustees and executors, in trust, to be managed by them to the best advantage for the purposes hereinafter mentioned. I desire my landed property shall not be sold, but rented out to the best advantage. I desire that my trustees and executors, out of the issues and profits of my estate, real and personal, shall purchase two acres of ground in Newbern, and as soon as the funds arising from the profits of my estate be deemed by them sufficient to make a commencement, that a brick house shall be erected on said land, suitable for a school room, and finished in a plain manner, fit for the accommodation of indigent scholars, and be called "Griffin's Free School." And it is my desire, that as soon as the house is finished, and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be employed to teach and educate therein, as many orphan children, or the children of poor and indigent parents, who, in the judgment of my trustees are best entitled to the donation, as the funds are found equal to—and it is my wish to clothe and maintain the indigent scholars as well as school them: and when they shall arrive at the age of fourteen, it is my desire that my executors bind them out to suitable occupations. And to prevent misconception, my meaning is, that the amount of my estate, real and personal, be considered as a principal sum, and remain undiminished forever; and that the issues and profits only shall be appropriated to the support of the said free school. And it is my desire, that (97) all interest arising from money, shall be put out at interest again, and be deemed principal, and continue at interest until, by my executors, it shall be deemed sufficient to put the institution in operation."

The heirs at law and next of kin, filed this bill against the executors and trustees, praying to have the trusts declared void, and that the defendants might be declared the trustees for them and for an account.

*Held*, by a majority of the Court, that the Statute of the 43d of Elizabeth, c. 4, is in force in this State, and that the Court of Equity, by virtue of it, has jurisdiction of all charities.

*Held also*, that independent of that statute, and though the jurisdiction of charities in England belong to the Court of Chancery, not as a Court of Equity, but as administering the prerogative of the Crown, the Court of Equity of this State hath the like jurisdiction: for, upon the revolution, the political rights and duties of the King devolved upon the people in their sovereign capacity; and they, by their representatives, have placed this power in the Courts of Equity, by the acts of Assembly of 1778, c. 5, and 1782, c. 11.

But if this were not so: *it is further held*, that as there are trustees and a trust for a definite charity, and a specific object pointed out, the Court would, as a mere matter of trust, take cognizance in this case, by virtue of its ordinary jurisdiction as a Court of Equity.

*Held also*, that, if the Court of Equity had no jurisdiction of charities, as such, nor of a trust relating to them, and could not, upon a bill by

the trustees or others, establish the charity by decree, yet, inasmuch as the estate of the trustees is good at law, and the condition or trust is certain and not unlawful, no trust results, in this case, for the heir or next of kin, and, therefore, the bill is dismissed.

*Held also*, that this will doth not create a perpetuity: for the trustees have the power of alienation—and though notice to the purchaser might affect him in equity, yet that, being a circumstance collateral to the power of selling, will not affect the question of perpetuity: and the clauses in the bill of rights and Constitution, were designed only to prevent dangerous accumulations of individual wealth, and referred to estates-tail alone: the establishment of a *permanent fund for charitable uses* does not come within the mischief, and is not prohibited by either of those clauses, nor by the common law.

Moses Griffin died in 1816, having made his will, in which he devised and bequeathed as follows: "I appoint Edward Graham, William Gaston, and three others, trustees of my estate and executors of my will—I will that all my debts and funeral expenses be paid out of my personal estate; and as to the remainder of my estate, both real and per-
(98) sonal, I give the same to my said trustees and executors, in trust, to be managed by them to the best advantage for the purposes hereinafter mentioned." The testator then directs that his money shall be vested in bank stock, or put out to interest, as also the debts due to him when collected. He adds, "I desire my landed property, consisting of houses and lots in the town of Newbern, shall not be sold, but rented out to the best advantage. I desire, that my slave Jane be hired out, and as soon as her wages amount to a sum agreeably to what the law requires for setting negroes free, that she be set free according to law"—with similar provisions as to several other slaves. Then follows this clause, "I desire, that my trustees and executors, out of the issues and profits of my estate, real and personal, shall purchase two acres of land, in some convenient and healthy place in the town of Newbern, and as soon as the funds arising from the profits of my estate, be deemed by them sufficient to make a commencement, that a brick house shall be erected on such part of said land as my executors shall determine on, which shall have a large room laid off and finished on the first floor, suitable for a school room, and the remainder of the house finished in a plain manner, fit for the accommodation of indigent scholars, and be called "*Griffin's Free School.*" And it is my desire, that as soon as the house is finished, and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be em-

ployed for the purpose of teaching and educating therein as many orphan children, or the children of such other poor and indigent parents as are unable to accomplish it with their own means, and who, in the judgment of my trustees, are best entitled to the benefits of the donation, as the funds are found to be equal to; and it would be my wish, should the funds, by good management, prove equal to it, to clothe and maintain the indigent scholars as well as school them; and when the scholars shall arrive at the age of four-
(99) teen years, it is my desire that my executors bind them out to trades, or other suitable occupations. And to prevent misconception, my meaning is, that the amount of my estate, real and personal, at the time of my decease, shall be considered as a principal sum, and is to remain undiminished forever, except the payment of my debts and legacies hereinbefore bequeathed: and that the issues and profits only shall be appropriated to the support of the said free school; and I would have it understood, that it is my desire that all interest arising from money put out at interest shall be again put at interest, and deemed principal, and continue at interest until, by my executors, it shall be deemed sufficient to put the institution in operation."

The complainants are the heirs-at-law and next of kin of the testator, who filed this bill against the executors and trustees, praying to have the trusts expressed in the will declared void, and that the defendants may be held to be trustees for them and for an account.

There was a demurrer, and the cause was transferred here for a decision of this Court.

*Gaston*, in support of the demurrer.—The will must be executed, unless complainants can show something in it which the law so abhors, that it must be set aside. There is nothing in the devise which is forbidden by law. On the contrary, the purposes of it are peculiarly favored.

There is no perpetuity. "A perpetuity is an estate *unalienable*, though all mankind join in the conveyance," *per* Powell, in *Scattergood* v. *Edge*, 1 Salk., 229. So, Treby, Ch. J., says, "It is such a condition of a fee, that foeffee shall not be able to give absolutely to another." 12 Mod., 287. And Mr. Justice Blackstone defines it to be "the settlement of an interest which shall go perpetually in the succession prescribed,

*without any power of alienation.*" 2 Com., 174. The du-
(100) ration of an estate does not constitute a perpetuity; for every fee simple is, in contemplation of law, to a man and his heirs *forever*. It is the exemption from the power of alienation which makes a perpetuity. Duke of Norfolk's case, 3, Cases in Chan. Appen., 35. The enquiry upon this head then is, whether the estates be so limited that the devisees cannot sell or dispose of them? The legal estate is here given—and it is given to all intents and purposes, as to the realty in fee, and as to the personalty, in absolute property. It is given to the defendants by name, and they take as individuals. Their alienation therefore would be as valid as that of any other devisee, or as though they took it beneficially. The purpose to which the profits are to be applied can make no difference, for the law will never prohibit the present owner of an estate from disposing of the profits in charity. Perpetuities are not less favored in our law than that of England. Yet conveyances for such purposes as those mentioned in this will have always been held good there. Sanders (Sand. on Uses, 60, 61, 62, 68) states several instances which arose before the statutes of wills or uses. No other person, than the devisees, have an interest that can affect their power of alienation. There is no trust, that is to say, no equitable estate, in any other persons whatsoever. No individual but the devisees themselves takes an interest, under the will, in the estate given. There are none who can claim by virtue of any right in, or to the thing devised, so as to prevent, tie up, or control the alienation or use by the devisees. In other words, there is no *cestui que trust;* and therefore no technical trust, whereof the execution can be demanded by any person in particular. Hence a purchaser from the devisees *bona fide*, cannot be made accountable to any human being. To a trust, of which the execution can be claimed by an individual, it is indeed necessary that the estate and the trust should be limited to persons capable of
(101) taking and holding; for, on such limitations, equity puts the same construction, and, in enforcing them, demands the same requisites which law does.

Though there is no technical trust, it is admitted that there is a trust of another kind—a most sacred trust for the community, which will be upheld by this Court. The estates are devised to the intent and purposes, that out of the in-

come a *free school* shall be established; and to this purpose, and this only, the devisees are, in *conscience*, trustees.

This then is a charity: and is one of the most beneficial. It will be sustained, and will repel the claim of the heir-at-law and next of kin. It is unquestionably one of those charities recognized in st. 43, Elizabeth, and is peculiarly favored in the law. 2 Inst., 707; 2 Fonb. Eq., 205. Thus, if a devise be to a charity, the Court of Chancery will interpose trustees. *Maggridge* v. *Thackwell*, 1 Ves., 36. Though the statute of wills permits not devises to corporations, yet a devise to a corporation for a charitable purpose is held to be good. Griffith Flood's case, Hob., 186; Case of Christ's College, W. Bl. Rep., 91. Devise to trustees for a charity, and they die before the testator, will be sustained in equity. *Attor. General* v. *Hickman*, 2 Eq. Ca. Ab., 193; 1 Bridg., 170. And this principle is still more strongly exemplified in cases of execution *Cy-pres*. Conveyances to charity are not dependent on, or necessarily referred to, the statute of 43 Elizabeth. There were many cases before it; they were held to be valid, though it certainly is not easy *now* to say in what mode the performance of the trust was enforced, or the abuse of it punished. Porter's case, 1 Co., 24, and note, and Sutton's Hospital case, 10 Rep., 1, which is explained in the *Attorney General* v. *Bowyer*, 3 Ves., 726, show this; as likewise do the numerous cases cited in *Adams* v. *Lambert*, 4 Rep., 104–116, and the opinion of Chief Justice Marshall, in the case of the "*Baptist Association* v. *Hart's executors*," 4 Whea., 33, 37. The st. 23, Hen. VIII., to avoid *superstitious* uses, proves
(102) that charities were common in that day. Above all, the st. 43, Eliz., proves their existence and validity, and the benignity with which they were regarded by the law.

It is exceedingly probable that the remedy was not direct, certain or safe, and that the usual mode, as to lands, was by entry for the condition broken, as in Porter's case. That statute was enacted partly to declare that conveyances to charity were not within the mortmain acts; but chiefly to protect the charities then in existence, or which might thereafter be created, from the fraud, negligencies or breaches of trust of the trustees, by giving a more easy remedy, by preventing a defeat of the charity by a fraudulent compromise between the feoffee and the heir, the latter of whom was irresponsible when he entered for a condition broken.

There is no case, no *dictum*, nay, not even a suggestion, before that statute, that such conveyances or trusts were void.

Since the statute, the jurisdiction of Chancery in England to enforce these trusts, has been established and defined beyond all doubt. That cannot be denied by anybody.

The statute is in force here. Why should it not be? There was not the slightest intimation given by this Court, in *Haywood* v. *Craven's executors*, that it had been repealed: All sides admitted it to be in force, in that case. It has since been reported, as a subsisting law to the Assembly, by the commission for the collection and revision of the British statutes, and by the Assembly been ordered to be printed, as such. It was passed before the colonization of America, and a series of adjudications had been made on it, building up a body of law in regard to charitable uses long before the revolution, and, indeed, before our country was settled. The Chancellor had then a jurisdiction as definite and settled over charities, as he had of infants, idiots and lunatics. Coop. Eq. Pl., 27; 2 Fonb. Eq., 205, 207; 1 Ch. Rep., 134. Our forefathers, therefore, brought this statute, and the (103) various resolutions on it, with them. Nor did they long delay to create an appropriate tribunal for the exercise of the powers specified in it, for compelling the fulfillment of the charitable intent of donors. A Court of Chancery seems to have been coeval with the first legal institutions of the country. By the act of 1782, c. 11, Courts of Equity are to possess all the powers and authorities that the "Court of Chancery, which was *formerly* held in this State under the late government, used and exercised, and that are properly and rightfully incident to such a Court, agreeably to the laws in force in this State and not inconsistent with our Constitution." The Court of Chancery is referred to, as existing in the act 1720, c. 6, and there can be no doubt but its model was the Court of Chancery in England. The jurisdiction, the power of compelling the execution of charitable trusts, was an acknowledged and notorious incident to the English Court of Chancery, and thus attached itself to our Courts. Hence there can be no doubt, but such a power belonged to the Court of the Province; and as little doubt, that it ought to be exercised now.

It is perfectly immaterial whether the power belongs to

the Court, as an ordinary Court of Equity, or as a part of the jurisdiction which the Chancellor claims as keeper of the conscience of the Sovereign, who is bound to have those trusts enforced which concern the community. Probably where there is a definite trust, or where there are trustees, the Court takes cognizance of it, as a matter of trust, in virtue of its ordinary jurisdiction. 4 Whea. Append., 20, and the case there cited. If it belong to the extraordinary jurisdiction, it is precisely in the same right as is the custody of infants and idiots; of which the origin is at least as obscure as the other. 2 Fonbl., 224–225. We find our Courts in possession of this latter jurisdiction, and that they daily exercise it; and why not the other?

(104) The very obscurity, in which this question rests, and the difficulty we have in referring this jurisdiction to the appropriate department of the functions of the Chancellor, show its antiquity, and prove its connection with the ordinary faculty of decreeing trusts upon original bill; which has been exercised in relation to charities, incontestibly, for ages past. But admit it to belong to the King as *parens patriæ* in virtue of his prerogative. This part of the prerogative, at least, was not intended for the personal interest of the sovereign, but was peculiarly designed for the good of the people; and at the revolution, it devolved on the people. While in a state of pupilage, he had it, as their parent and political guardian, and exercised it by the magistrates to whom he entrusted matters of conscience; now the people being of full age, and choosing to govern for themselves, take it, as the *patria*, and exercised it by the magistrates to whom they commit matters of conscience. There is no more incongruity in a Republic, as a Republic, having a conscience, than in a King, *as* a King.

But indeed the question in this case, is not whether the Court will establish the charity. The devisees are not asking anything of the Court; nor has any person, claiming the benefit of the charity, prayed the Court to interfere and compel the devisees to perform their trust. It will be time enough, when a bill shall be brought for either of those purposes, to show that this Court can enforce a charitable trust. But here the question is, will the Court prevent the execution of a charity, and declare it void? Suppose that there are no means of compelling a conveyance, or the execution of the trust by the devisees, that this Court has no power, in

any of its capacities, to superintend the performance of the testator's will; yet the complainants shall not, for that reason, have the estate. This is the true point of view. The property belonged to Griffin, and he had a right to give it as he pleased, so that he did not violate the laws; it was his risk, whether the persons to whom he has given his estate, and in whose hands he has deposited this trust, would (105) perform the trust or pervert the funds. He had a right to run the risk, and he has chosen to do it. It is not unlawful for him to direct his devisees to establish a free school—it is not unlawful for them to do it; and if the Court will not aid them, it will, at least, not deprive them of the means of doing the will of their testator by taking away the estate. Before the complainants can succeed, they must show that this will contains a disposition unlawful in itself, and they must show that very clearly; otherwise, the Court will not annul the will, and disappoint the generous purposes which the testator has declared, and the beneficent charity which he has created in it.

*Mordecai*, for the complainants.—Wherever a trust cannot take effect, by reason of some defect in its constitution, or accident happening after its creation, it will result to the benefit of those who would have taken the estate, had no attempt been made to create the trust. 3 Pr. Wms., 20, 252; 1 Bro. C. C., 508; 4 Bro. C. C., 409; *Haywood* v. *Craven's executor*, 2 Law Rep., 557.

The trust here is not valid. Trusts are now what uses formerly were; and if the use before the st. 27, Hen., 8, would not be good, so neither will the trust be now. 2 Atk., 150; Hardr. Rep., 491; 1 W. Bl. Rep., 180, 182; Shep. Touch., 507. Before the statute of uses, there was a distinction between uses and trusts. Uses were of a *permanent* and general nature, trusts of a special or *transitory* nature. Sand. 7. It was the intention of the framers of the statute to abolish both, for trusts are mentioned in it as well as uses. Owing, however, to a little oversight in the Legislature, and a scrupulous adherence of the Judges to the letter of the statute, many cases arose which the statute did not execute. This called for the interference of chancery, and they were entertained as trusts in equity. Sand., 176. But this new trust was not the transitory trust known before the statute. (106) It was of a permanent nature, and nothing but a

*secondary use.* Sand., 177. A use could not be limited to a *parish*, or any indefinite multitude. 13 Hen. VII. 9 b., cited Sand. 62, 69. So, therefore, a trust of the same nature is void now.

It may, however, be conceded that there are at present some trusts in England for the benefit of indefinite objects, which are good. But it is only so in cases where the king, as *parens patriæ*, may enforce them by virtue of the prerogative, or the chancellor, as a partaker of the prerogative, under the st. 43, Eliz., c. 4. It is not, upon any general principle, applicable to the transmission of property, that a trust to an indefinite multitude can be supported. To constitute a valid gift, there must be a donor, a *donee*, and a thing, and the donee must be capable of taking, and be designated either as a natural person or a corporation. Plow. 563; Co. Lit. 2 b. So, to constitute a valid devise, there must be a devisee capable of taking, who must be certainly designated by name or by description. Pow. Dev., 314, 337. And a devise to parishioners is void, Br. Ab. Tit. Devise, 55, 77; Pow. Dev., 337; and such a devise is not only void at law, and as an use, but also as a trust. Shep. Touch., 509. Whether by deed, or by devise, or by way of use, such a conveyance to an indefinite multitude is therefore void *at law*; with a solitary exception, that a gift from the King to the "*good men of Islington*" is good; because the gift being made *by the King, ut valeat*, they became *ipso facto* a corporation. Dyer, 100; 2 T. R., 672.

If this gift to "orphans, or to the children of poor and indigent persons," would be void at law, when directly made to them, it is likewise void in equity, though a trustee be interposed. The interposition of a trustee only changes the forum, not the right. The trustee is viewed as a mere
(107) instrument. 1 Bl. Rep., 160. And a Court of Equity puts the same construction upon trusts, which a Court of law does upon legal estates. 2 Bur. Rep., 1108; 1 P. Wms., 35, 88, 90, 109, 143; 1 Bro. C. C., 206, 222; Shep. Touch., 507, note. There cannot be so much magic in trusts, that they shall be sustained, when no person is designated who can take under them. Who can take, when nobody is pointed out to do so? There cannot be this difference between legal and equitable estates; for a man takes the former directly, and the latter is *handed* to him. Upon general principles, therefore, the claim of the plaintiff cannot be resisted. But

it is said, this is a *charity*, and thence is governed by peculiar rules, and forms an exception to the general rule of law. It is admitted that there are cases where the English Court of Chancery has sustained charitable devises to indefinite objects, contrary to the principles which regulate their decisions in other cases. But that is not by virtue of the equity jurisdiction. It is a branch of the royal prerogative delegated to the Chancellor by the King, 3 Bl. Com., 47, 427; Coop. Eq. Pl., 27; 2 Fonb. Eq., 206; and, in some cases, the charity is even now applied under the sign manual. 2 Vern., 225; Dick. Rep., 168, 169, 258. Who is the *parons patriæ* of North Carolina? Who holds the prerogative? Who is, more especially, the keeper of the sovereign's conscience here? It is vested, not in the Judiciary, not in the Chancellor, but, if anywhere, in the Legislature. In that body resides the sovereignty of the State, if it hath been delegated by the people at all. The rules which govern the Court of Chancery, in its *extraordinary* capacity, are not applicable to our Courts.

The cases in Chancery, where charities to indefinite objects have been decreed, are founded upon the statute of Elizabeth; and the whole jurisdiction is traced by elementary writers and by adjudications to that source. Abstracted from and independent of that act, the Court cannot relieve; (108) though the Chancellor personally, and as the delegate of the Crown, may act. No case can be shown of relief in *equity* before the statute. Porter's case, for instance, proves that very strongly. The devise, in that case, was made in 32d Hen., 8, the lease by the wife in 3d Ed., 6, and the entry of the heir in 34th Eliz, which is a period of 51 years. No man can believe that a Court of Equity could then decree the charity; otherwise a resort would certainly have been made to it, instead of the roundabout way of entry for the condition broken, and then a conveyance by the heir. The object of the heir and the Queen both, was to effectuate the charity. The conviction necessarily follows, that they would have gone to equity, if equity would do anything for them. Indeed, it is extremely probable that that very case was a cause of the passage of the act of 43 Eliz, which recites the evil to be "the frauds, breaches of trust, and negligences" of the trustees, and provides the remedy. The statute does not affect to appoint "*commissioners*" *instead* of the Chancellor, against whom no charge is brought; but it constitues the

commissioners, and, after them, the Chancellor, tribunals to redress the frauds of the trustees. Every case, therefore, and every recital and provision of the statute, contradicts the supposition that Chancery gave relief before, and proves that the jurisdiction is to be deduced from the statute. This is entirely confirmed by the fact, that immediately after its passage, we find a multitude of applications to Chancery: Callinson's case, Hob., 136, decided 15 Jac., 1; Griffith Flood's case, Id., ibid; in which the Judges certified to the Court of Wards, that the will was void at law, but *good under the statute; Higgins* v. *Town of Southampton*, stated to be decided in 1671, 2 Vern., 454; *Attorney General* v. *St. John's College*, Ca. in Chan., 267; a case in Chancery cases, 134, of a devise to the Parish of Great Creation, and *Attorney General* v. *Rye & Warwick*, 2 Vern., 453, in 1703 And in all these (109) cases, the Judges *rely on the statute*, not as to remedy only, but as to the *devise also.* Saunders, 61, 62, is quoted by the other side, to show that such conveyances and such trusts had *always* been sustained and favored by the Courts. The authority cited for that position is Porter's case; which certainly does not support it, as is clearly shown by Chief Justice Marshall, in *Baptist Association* v. *Hart's executors*, 4 Whea., 35. In this latter case, too, the *dictum* of Lord Keeper Henley, in 1 Wm. Bl. Reports, is answered and overruled. It is unquestionable, at least, that the statute of Elizabeth does give validity to some charitable devises, not valid independent of it, and that the cases, where the objects were too vague to take without the aid of the statute, have proceeded upon it. Idem., 31, 43. If the statute be not in force here, the case of *Baptist Association* v. *Hart's executors* is expressly in point for us. That was a devise of an estate "to be a perpetual fund for the education of youth," as this is; and the circumstance, that the legal estate devised to the Association was void because they were not a corporation, can make no difference; for if the English rule prevail, the *death* of the devisee before the testator would not affect the estate to the charity, as appears by the *Attorney General* v. *Hickman*, and *Maggridge* v. *Thackwell*, cited for the defendants.

The statute of 43 Elizabeth is not in force in this State. We have not the officers which it requires—neither the Chancellor nor the Bishop. The rules which govern the English Courts are incompatible with the rights of private

property. In Baxter's case, 1 Vern., 248, and in *De Costa* v. *De Pas*, Amb., 228, the funds were diverted from one charity to another. So, a conveyance by a *feme covert* to a charity, was held good in Damus' case, Mod., 822, also, devise by copyholder, without a surrender, Rivett's case, Id., 890; and tenant in tail *devised*, without a fine or recovery, to a charity, and barred issue and remainderman. *Attor. Gen.* v. (110) *Rye and Warwick*, 2 Vern., 453. Such dispositions could never, under our laws and Constitution, be supported, to the injury of third persons. Although the statute was reported to the Legislature, that was only the opinion of the gentlemen who collected them, and is of no authority here; and the Assembly refused to adopt the statutes, or do more than merely to pay for the printing of them. The principle of charities is impolitic, and ought not to be adopted without express statutory provisions. They tend only to gratify vanity, and encourage, by maintaining, idleness. They come within the reason of the *mortmain* acts; and those by devise became so numerous and dangerous, that, in modern times, and without any illiberal feelings towards rich monasteries or other superstitious or religious establishments, it was found necessary, even in England, to circumscribe them. The statute, 9 Geo. II. c. 36, is a most beneficial law, and has been construed liberally against these donations of real estate to charities. If in England they have been obliged to retrace their steps, why should we, by a forced construction, adopt principles which true policy forbids, and which we shall find much difficulty in getting rid of, if once received. It never has been understood by the profession, that the statute of charities was in "force or use" in this State. It is not comprised in the collection by Martin, and no case has been decided which recognizes it. Every college and academy in the State applied for acts of incorporation to confer on them capacity to receive donations, which would be wholly unnecessary, if trusts for schools at this or that particular place were good, and could be enforced by bill in this Court. The case of *Haywood* v. *Craven's executors*, proves that the statute is not the law of this State. Surely the emancipation of a slave is not merely a case analagous to one provided for in the statute, but comes within the express letter of it: "The relief or redemption of captives," is at the least as great a charity as "the support of free schools," or "the education and preferment of

(111) orphans." If it be said, that the Court could not execute that charity, because the slaves could not be lawfully set free, then execute *Cy-pres*, or sell the slaves and give the proceeds to the Colonization Society, or redeem captives in Africa, or apply it in any other method similar to that expressed in the will, under the sign manual, as in the case in Ambler. But the Court would not; and, on the contrary, declared a trust for the next of kin and heir-at-law.

This is certainly a perpetuity. The power of the trustees to dispose of the legal estate, even if they have such power, cannot make it otherwise. But it is not proper to look upon the will in that light. The true point is, to enquire the object. The object is a perpetual succession of scholars, *without end*, none of whom can alien the property. The estate of the trustees is of no value, no consideration—it is nothing. In equity, we must strip it of the legal estate, for equity regards only the interest of the *cestui que trust*, and then it stands, naked, a perfect perpetuity. But regarding even the estate of the trustees, how is it? There is to be a *perpetual* school, which is to be supported out of the income of their estate: the trustees must take an interest commensurate with the trust, and, therefore, their estate also is perpetual. Com. Dig. tit. "*Devise*," N. 4; 1 Ca. L. & E., 382. It is true, that as to the real estate, there is only a recommendation not to sell. But when the gift and object are certain, words of desire, request or recommendation, create a trust. 1 Atk., 469; 2 Bro. C. C., 38, 226. It is said, however, that the alienation of the trustees would be good, and could not be impeached. That would depend upon its being *bona fide* or *mala fide*; if the latter, it is clear the purchaser would be subject to all the claims that could have been made upon his vendor—if the former, that is to say, for a valuable consideration and without notice, then, indeed, he would hold exempt from the trust, because the privity would be destroyed. And (112) this is the case with all trusts; which brings the question here, according to the view which has been already taken of it, to this: Whether this be a good trust, to be executed by this Court in its ordinary capacity of a Court of equity, which, we say, is its only capacity, according to our law?

*Seawell*, on same side. The complainants insist that they, being the heirs-at-law and next of kin, are entitled to the

estates, unless a higher equity can be set up in some other persons. The defendants set up a claim in themselves, because the estates are given to them by the will, for certain purposes therein mentioned. It is immaterial by what name we call the object of this devise; whether we call it a trust or anything else; for, if the executors take the estate under a clear manifestation that no benefit was intended to them, but that they were to apply or to keep it for a particular design, they thereby become trustees. We say, that the purposes declared by the testator here, would, if carried into execution, establish a perpetuity. Lord Nottingham, in the Duke of Norfolk's case, Ch. Cas. Append., 28, defines a perpetuity to be, such a settlement of an estate as places it out of the power of the tenant to assign the estate; but the settlement remains a perpetual clog. But, indeed, the law is not satisfied with there being some remote period when the estate shall become unfettered. An absolute perpetuity is not the only forbidden limitation. The law alike frowns on a settlement containing provisions approaching or having a strong tendency towards it. Hence the rule seems now settled, that the utmost limit allowed, is the period of a life or lives in being, and twenty-one years, and a few months over to take in infants *en ventre sa mere.* 2 Bl. Com., 174; Duke of Norfolk's case. The trust here is a plain perpetuity: For the testator directs that the amount of his estate shall be deemed a "*principal fund, and remain undiminished forever*, for the purpose of establishing and supporting a (113) school." Cases have been already cited to shew, that the trustees must take estates *qualified* to maintain the trusts, and therefore that they must be perpetual. But without adjudged cases, reason would shew, that when a power is conferred or a duty enjoined to do a particular act, or make a particular disposition of property, the means requisite for the end are necessary to be granted. It is obvious too, that the executors take everything in trust, from the whole will. We say, that whenever the purpose for which an estate is devised is specially pointed out, *that* alone will constitute the devisee a trustee, and that whenever it appears that the testator did not intend the devisee to take beneficially, *that* also converts him into a trustee—for the property belonged to the testator and he had a right to limit the enjoyment as he pleased, 2 Ves. jr., 333, 529; and, therefore, that the case is not altered by its being a *recommenda-*

*tion* only, not to dispose of, or alien the *lots* in Newbern; for such recommendation is equal, as to this point, to a positive injunction. 2 Br. C. C., 38, 226. The estate, therefore, which the executors took, being in trust, and the nature of that trust being to lock up the fund forever, the devise affects to create a perpetuity and cannot be supported. For as it never was the intention of the testator, that the trustees should be benefitted by the estate, so a Court of equity will not only exonerate it at law from being liable to the debts of the trustees, but control the estate as a trust fund even in the hands of a purchaser, if he has notice, though he be a purchaser under execution.

It is, however, said, that the purposes of this testator are such, that the law is willing that property should be forever clogged to answer them; that here is a free school, and therefore the community hath an equivalent. This is, by far, the most imposing part of the defendant's case, and is one upon which we ought not to trust our feelings. Upon such an occasion, we are too apt to look at the object, without adverting to its attainableness. The object engages our
(114) feelings in aid of it, and creates an influence which imperceptibly operates in controlling our judgments. A shade is insensibly cast over both cases and principles, when arrayed as obstacles. These feelings are commendable, and shine nowhere with brighter lustre than on the seat of justice. We do not complain of them. But it is certain, that they are at times dangerous, and nowhere more so than on the bench. They are there, what Mr. Justice Buller called, "the quicksands of the law." Religion and learning are at all times, and in all places, powerful. It ought not to be thought that they are never in the wrong: nor ought it to be said or thought, that they will be at all times triumphant, even in Courts, though they be in error.

It has been, indeed, said, that the testator was well apprised of the risk he had to run, and that it was his lookout to provide for the execution of the trusts. We say, on our part, that the defendants must account to the heirs and next of kin for the estate they hold, unless they shew a beneficial interest in themselves, or that they hold it in trust for such others as can *enforce* their claim. The question is not, whether the defendants are at liberty or *can* dispose of the fund in purposes of benevolence or charity, but whether they are *bound*—whether they can be *compelled* to do it. For,

unless there be a *valid* trust for somebody else, one that this Court can *enforce* at the instance of *cestui que trust*, the trust results to the complainants. The case of *Maurice* v. *Bishop of Durham*, 9 Ves., 399; 10 Ves., 522, was upon a devise of an estate to the bishop, "to be disposed of *to such objects of benevolence and liberality* as he should most approve of." Both the Master of the Rolls and the Lord Chancellor declared the objects too indefinite and the trust void, because there was no person who could claim its execution, and decreed for the next of kin. In that case, it is obvious that it might have been answered that it was the testator's risk.

( 115 ) The validity of every trust is to be tested by the same rules that govern legal estates; and Courts of Equity, in ascertaining the rules of property governing trusts, follow the Law. 1 Bro. C. C. 223. 2 Ves. J. 655. 1 Bl. Rep. 160. The interposing of trustees makes no difference, for the *cestui que trust* stands in the shoes of the trustees, and if no Equity would pass without a trustee, he is not better off with one.

Unless, therefore, there be some person to whom the estate would have passed, had it been a legal estate, the limitation is void, and the trust fails. Here the trust is for such poor and indigent persons as the trustees, in their opinion, think worthy of the donation; and the school is to be put into operation whenever, in the opinion of the trustees, the state of the funds will allow it. Who is there that can set up any claim upon the trustees to enforce such a trust? It is all to depend upon their opinion—the whole fund to be perpetually applied in this way as far as the interest, and all according to their discretion. Can the Court break through the will, and say, the Court will judge in a matter which the testator has confided to an individual? If it could, then under the pretence of executing the dying words of the testator, it would, in fact, be making a new will for him.

Sanders 60, 69, says, that a devise to the use of the inhabitants of a parish is good as a trust, though void as an use. He refers to the case of *Attorney General* v. *Hewer*, 2 Vern. 387, which does not support him, as the only point decided there was that the inhabitants could not sue in the name of the Attorney General. But, admitting the authority of the position of Sanders, the case is still different from this; for the inhabitants of a parish are persons capable of designa-

tion, and *id certum est quod certum reddi potest.* Possibly that may be properly likened to a bequest to "relations," who are held to mean the next of kin, and, of consequence, are capable of taking under a limitation of a legal estate. (116) But if the objects be too indefinite, either as regards persons or things, then according to the Bishop of Durham's case, the trust must be for those whom the Law has appointed. It is very certain, that previous to the statute of uses, there was a marked distinction between uses and trusts; and that since the statute, we find it laid down, that Equity has new modelled those trusts, pruned them of their inconveniences, and made them subservient to valuable purposes, and that they are now what uses were before the statute. The plain meaning of which seems to be, that they possess in Equity the essential qualities of legal estates at Law, and will be supported or avoided accordingly. But it is admitted, on the other side, that there is no trust here which any person can claim—that no individual can call upon the trustees for a participation in the donation. Yet it is said, in the next minute, there is a sacred trust, which the Defendants are bound to perform, and which the Court will, for centuries to come, enforce. By this sacred trust, I suppose, is meant a duty to the community at large, it being for the erection of a free school. On that account, it is said, this Court, as a sort of *parens patriæ*—as a kind of *cestui que trust*—representing all the poor and indigent, will compel the execution of it. If we look to the English jurisprudence, we shall find, that, unbounded as the prerogative then was, the King did not presume to exercise such a power until after the 43 Eliz. Porter's case shows very clearly, that Chancery did not then take upon itself, as the organ of the King, or in any other capacity, to execute a trust even for a hospital, unless a hospital was in existence capable of insisting upon and taking, as legal owners, the estate or the trust. For, in that case, there was evidently a contrivance and juggling between the heir and the Queen's Attorney and Solicitor Generals, by the entry to divest the estate, and then to convey it to the Queen, who should apply it according to the will. And so Lord Loughborough looked upon Porter's case and the general doctrine at that time to be, when (117) he says, in the *Attorney General* v. *Bowyer*, 3 Ves. 726, that then "they made out the case as well as they could at law." Now, in Porter's case, the condition was,

that the lands should be conveyed to the hospital in convenient time, as counsel learned in the law should devise, and such a condition, not being immoral, was held not to be void; and although it was contrary to the statutes of Richard and Henry, yet the Queen could create the corporation and grant a licence to hold lands, and, therefore, it might be lawfully done.

It has been argued from this, that although there was no *cestui que trust*, yet, as the Queen could make them by charter, and the use was not immoral, and, for those reasons, was upheld; so here, Chancery is *de facto* to become the *cestui que trust* as *parens patriæ*. This might possibly do, had this Court not decided the case of *Haywood* v. *Craven's Executors*, in which Porter's case was cited and much pressed by the counsel for the Defendants. The testator there bequeathed to his sister the whole of his estate for life, and, after her death, to his executors, in trust, to have his slaves set free by the laws of the State, and then that the lands and other property should be applied to their use. The Court there said that such a trust could not be supported; for by the existing laws of the land, no individual shall liberate a slave but for meritorious services; and though the Legislature might authorize it, no time should be given to the executors to apply therefor, and they were decreed to surrender not only the slaves, but the whole estate to Haywood, who was the devisee of the heir at law, and next of kin. Porter's case was therefore, I think, of no avail in that case; for surely the General Assembly of North Carolina could as rightfully authorize the liberation, as the Queen could create the corporation and license the purchase.

Then as to the statute of Elizabeth:—That statute was certainly made to remedy the defects which existed in enforcing the execution of those trusts, where those who
(118) felt interested could not "make out at law." The preamble speaks as much. Where was that act of charities, when *Haywood* v. *Craven's Executors* was decided? It was certainly urged upon the Court, with much force and eloquence; but it was disregarded and rejected by the Court, and a decree was made in contradiction to it. The objects of charity mentioned in the statute are, marrying poor virgins, ransoming prisoners, support of free schools, care of poor people, and the like. It cannot, therefore, be contended, that the liberating of a slave did not come within the very

letter of the act of Parliament. It is said, however, that the law forbade emancipation, except for meritorious services. I answer, that the testator did not design to contravene the law or its policy; for he directs his executors to set his slaves free, whenever the laws of the State shall permit it.

There is something further in that case. What was done with the lands and other estate, besides the slaves? Did the Court then adopt the statute of Elizabeth, and say, as the main object was a charity, the ransoming of prisoners, we will come as nigh it as possible, and direct a scheme? No. The statute was laid out of the question, and the whole estate, which might, under that statute, upon the principle of *cy-pres*, (*Attorney General* v. *Boultbee*, 2 Ves. Jr. 380, 387, 389,) have been given to the University, or employed in civilizing the Indians, was decreed to the Plaintiff. Besides, it is not true that the policy of the law forbids the emancipation of slaves. It forbids emancipating them, and keeping them here. Why did not the Court allow the executors to send them out of the State, and to sell the lands for the purpose of defraying the charges and providing comfortably for them abroad? The answer is, the Court had no authority to do so, unless it might be under the statute of Elizabeth; and that not being in force, there was no power to defeat the claim of the next of kin and heir. For, if it be said, that the liberating a slave consistently with law, is not a (119) charity within the statute, words must have changed their meaning, and the nature of things altered. Charity is made to smile on learning, while she frowns on freedom!

It has been already shown, that the power exercised by the Chancellor in England in supporting trusts, otherwise void, is not in virtue of Chancery powers, but is a branch of the royal prerogative, operating under the statute of Elizabeth, and that the power is personal to the Chancellor. Who would be considered the *parens patriæ* in this State, or where the Lord Chancellor is to be found here, are questions equally perplexing to me. Mr. Tucker expresses the opinion, in his Notes upon Blackstone's Commentaries, that, upon the change of government, everything like prerogative vanished.

Old acts of Assembly have been ransacked for the purpose of shewing that we had a Court of Chancery before the revolution, and thence of inferring that this power belonged to

that Court. But not a trace of the exercise of such a power, or of the operation of the statute in this State, can be found in history, or has reached us by tradition. It is remarkable, that in the act of Assembly of 1749, c. 1, Swann's Rev., 293, which enumerates all the English statutes which were or should be in force here, this statute should be omitted, although several others of that reign are specified. That fact is conclusive upon the point. It cannot, therefore, be supposed to be embraced by the act of 1778, c. 5, as *having been in use* here: the more especially as at that time we had no Court of Chancery, and did not have one until 1782; and the Court will not construe a statute as adopting another, when, by the existing law, there was no Court to execute it. There is, however, an essential difference between the powers of the Courts in the two countries. In England, the King can alone create a corporation qualified to take any beneficial interest; and this he does through the Chancellor, the keeper of his conscience and of the Great Seal. Any scheme, there-
(120) fore, can be reported, and persons constituted a corporation fitted in character for the object of the trust. Our Chancellors are the keepers of their own consciences only, they have no Great Seal, which is the emblem of State and the evidence of sovereignty: they have no power to create a corporation, as that belongs to the Legislature.

*Gaston*, in reply.—If, instead of words of desire, the testator had given a positive command not to alien, that would not have made a perpetuity; for the order would have been void, and the estate of the devisees absolute. Lit., sec. 360. And Lord Kenyon, in *Doe* v. *Carter*, 8 T. R., 61, adverting to the rule of law which restricts the feoffor from making such conditions, and avoids them, remarks that such restriction is imposed *to prevent perpetuities.*

Words of desire will be construed words of command, where the testator has the right or power to command; but it is surely otherwise, when the law forbids such command. *Malim* v. *Keighley*, 2 Ves J., 532.

Nor does the necessity, that the estate of the devisees should be co-extensive with the trust, convert this into a perpetuity. The purposes can be accomplished without any such consequence. The objection only goes to the duration of the estate, and that has been already shewn to be of no weight. The test is the power of alienation. Here the trustees take

a *fee simple*, to enable them always to keep up a free school. But there is no particular part—no *item* of the property which, if they contract debts, may not be sold for them; or which the trustees themselves may not rightfully sell. But this is not enough. It is still objected, that the estate is to constitute a principal fund, and to remain undiminished forever, and the rents and profits only are to be used. The will only requires the "amount" of the estate not to be diminished; and that is a proper direction. It does (121) not apply to any particular articles, of which the estate is composed. The trustees may sell; they may change from one purpose to another; they may sell one school-house and build another; may collect the money due on one man's bond, and lend it to another; they may make use of everything, *as owners*, for the purpose of promoting the object which the testator designates; and they have a perfect control and full power over the whole estate at law and in equity also, excepting only that they cannot equitably diminish the "*amount*" of the fund. It is conceded that the authorities cited prove the positions, that a legal estate cannot be made to an indefinite multitude, and that Courts of Equity put the same constructions on trusts which Courts of Law do on legal estates. If this were a common trust, for individuals, in such strict settlement that they might forever enjoy, but could not alien it, it would be bad. The policy of the law forbids it. But that principle only applies to such trusts as sprang out of the statute of uses, being uses not executed by the statute: in other words, only to technical trusts. It may be admitted, as to them, that the legal estate cannot be sold for the debt of the trustee, so as to defeat the equitable owner. But there is no such trust here—there is no person in particular who can claim the benefit of it—no *cestui que trust*. The only enquiry, therefore, is, whether there be anything in the kind of trust created by this will, which is forbidden by law, or is against public policy. What is this trust? That a free school shall be kept up perpetually. Is there any law or maxim, that such a school shall not always be kept up? If it be a perpetuity, is there any law or maxim, that the *sovereign* or *country* should not have a perpetuity? May not the country do with its own as it pleases? If, while the Constitution enjoins upon the Legislature that, for the convenient instruction of youth, a school or schools shall be established, with such salaries

for the masters, paid by the public, as may enable them to instruct at low prices (Const. N. C., s. 41), can it be (122) believed that the same Constitution will forbid an individual to establish such school, in which youth shall be forever instructed and maintained to the age of fourteen years without any charge? Or will it be contended, that the schools mentioned in the Constitution were to be temporary, and that our young men were only to be taught for a season?

Why were none of these objections made to such *uses* before the st. 43 Elizabeth? Yet they were then deemed good. Porter's case, 1 Co., 24; 3 Ves., 726; 4 Whea., 33, 35, 37. Why, if such uses were abhorrent to the law, and absolutely annulled the donations to which they were attached, was the statute of Elizabeth passed avowedly to compel more easily their execution? Why is it that not a decision, a *dictum*, a suggestion, that such a use was a perpetuity, has been hunted up? Again: Why is it, that statutes were passed, at various times and at periods remote from each other, to declare certain of these uses to be superstitious and pernicious, if *all* were already so, as tending to create perpetuities, and thereby avoided the grants of property to which they were attached? Finally: Why is it that Judges speak of the *difference* of remedy before and since the statute, if these uses were, in themselves, evils which could not be tolerated, because they were against the first principles of public policy? Why should a remedy be provided for the breach of *such* a trust? Yet Lord Loughborough, Chief-Justice Marshall, and all Judges, speak of the remedy before being incomplete. Remedy, for what? To support a public nuisance!

*Porter's* case has been attacked; and it is said to exhibit a contrivance and juggle between the Crown and the heir. But it cannot be denied, that the decision was made on the strictest priciples of law. The only "juggle" was, by legal means to uphold the end—to enforce the very purpose of the testator. It would have been a reproach to the law, if some means could not have been devised to enforce (123) it and prevent the devisee from defrauding both the and the charity. The settled rules of the doctrine of conditions were found equal to the purpose in that case, and were adopted. But as they might not always be able to discover the heir, and might not find in him, if discovered, a

disposition to yield his own interest to reverence for the memory or respect for the wishes of the testator, or to a sense of duty to the public, the statute of Elizabeth was passed, shortly after that decision, to enforce the trust both against the devisee and the heir.

If this objection, as to perpetuities, be well founded, it will subvert all our colleges and other public institutions. By the bill of rights, sec. 23, the Legislature can no more create a perpetuity than an individual can. What then becomes of the canal companies and of all the religious corporations? What becomes of the University, chartered in 1789, and made "capable in law to receive money and chattels that shall be given for the use of the University, and the same to apply *according to the will of the donors*, and to take by gift, or devise lands to them and their successors *forever*, in special *trust* and confidence, that the same, or *the profits* thereof, be applied to and for the use of establishing and endowing the University?" This, therefore, is not a perpetuity.

The trust here is a valid one, and can be enforced. In all instances where a trust conferred appears to have been abused, equity will examine into it, and protect the trust. Even in the case of a corporation, where the trustees, by the terms of the charter, have in themselves the visitorial power, equity will not suffer an abuse of the trust. Thus, if the trustees of the University should appropriate the profits of their lands to the use of themselves individually, they would be corrected in this Court. As managers of the revenues, they are subject to the superintending power of the Court of Chancery, not as itself possessing the visitorial power or a right to control the charity, but as possessing a gen-
(124) eral jurisdiction, in all cases of an abuse of trusts, to redress grievances and suppress frauds. Per Story, J., in *Dartmouth College* v. *Woodward*, 4 Whea., 676. In what character could any particular individual bring a bill in this Court upon such a case? No person in particular has an interest in the estates of the University. The community has the interest, that her youth should be educated there; and equity will not allow that interest to be defeated. The same principle will apply here, and will lead to the correction of any abuse in the trust now before the Court.

But it is objected, upon the authority of *Maurice* v. *The Bishop of Durham*, that the trust here is *too vague*, as it leaves the choice of the objects *to the discretion of the trustees*. The

ground of that decision was wholly different from that supposed. It went upon the ground, that *no charity* at all was created by the will, technically speaking, because it did not come within the provisions of the statute of Elizabeth. The ideas of *charity* and *charitable uses* are chiefly derived from that statute, and thence flows their legal signification. Such clearly seems to be the notion of the Master of the Rolls, when he says, "those purposes are *charitable* which the statute enumerates, or which, by analogy, are deemed within its spirit or intendment; and to such purposes every bequest to *charity generally* shall be applied. But it is clear, that *liberality* and *benevolence* can find numberless objects not included in the statute in the largest construction of it. The word '*charitable*' seems to have been purposely avoided in this will." Hence it is evident, that the vagueness, which determined that case, was not, that the selection of the charitable objects was left to the *discretion* of the bishop, but that no charitable object was designated; that is, none that the law called *charitable.* Here it is different; for everything is certain. The subject is the whole estate in the hands of the defendants. The object is a free school; which is technically a charity. It is well settled, that the discretion of the (125) trustees does not make it the less a charity, 2 Atk., 87; nor does it oppose the right of this Court to interfere; for in all cases of discretionary powers, if they be abused, the Court will interfere, and, by virtue of its general jurisdiction over trusts, will take the trust out of impure hands, and place it in honester. 2 Fonb. Eq., 206; 4 Whea., 672, 676. And, upon a bill in the name of the Attorney General, (and any person, however remotely concerned, may be *relator,*) the Court will compel the trustee to act, or to assign the trust. Com. Dig. Tit. "*Chancery,*" sec. "Charitable Uses," 2 N., 1; *Attorney General* v. *Governors of Harrow School;* 2 Ves. Sen., 552.

This view of the subject is much strengthened by the case of *The Baptist Association* v. *Hart's executors,* 4 Whea., 1. The whole stress of the argument for the defendants was on two positions. The first, that the statute of Elizabeth had been *repealed* in Virginia. The second, that Virginia, and not the United States was the *parens patriæ,* and had the disposition of all charitable donations; thus, if the statute had not been repealed, or the suit had been in the Court of Virginia, it seemed to be agreed on all sides, that the trust would

have been executed. And here it may be permitted to enquire, whence the necessity of an express repeal of the statute in Virginia, if the agument be well founded, that it was never in force in North Carolina? Virginia did not expressly adopt it, more than we did. The truth is, that both States being countries discovered and peopled by English subjects, the laws of England then in being, and suited to their situation, became in force immediately. There could have been no institution more necessary to infant colonists, than schools for the education of youth. Hence it is, that an express repeal and not an express enactment was necessary in Virginia, and so it is here.

But the argument is still offered, that we had no Court of Chancery until 1782; and that there being no Court to execute the statute, it was not, therefore, in force. The (126) fact seems to be otherwise. Besides the proofs already offered of the existence of the Court here, others are found. The Court of Chancery is alluded to as having jurisdiction in legatory matters, in 1723, c. 10. Swan's Rev. 58. It is ordered to sit in Newbern, and to proceed by rules of practice before that time established, in 1746, c. 2, s. 17, 18. Id. 228. The fees of the Governor and the Clerk in Chancery, are fixed, in 1748, c. 2. Id 250. And lastly, it is recognized as having jurisdiction of orphans, in 1762, c. 4, s. 1. Ired. Rev. 202. But if we had no Court, it does not follow that the want of a remedy takes away the right. All laws remain in force until altered, though there may for a time be no appropriate tribunal. All the Courts of justice in this State were once shut; but that neither repealed nor suspended the laws. In *Haywood* v. *Craven's Executors*, the opinion of the Court expressly recognizes the statute of Elizabeth; but the case was declared not to come within its provisions, because "the trust was void, not only as contrary to the general policy of the law, but as repugnant to positive provisions by statute." It is plain that the ground of that judgment was, that subsequent statutes had prohibited that species of charity. It more proves, therefore, that the statute of Elizabeth is not in force here, than any decision upon the st. 9, Geo. 2, in England would shew that it was not the law there.

TAYLOR, Chief-Justice, delivered the opinion of himself and MURPHEY, Judge, who sat for Judge HENDERSON.

It is impossible to read this will without wishing the objects of it may be lawfully accomplished, since their nature is so purely benevolent, and they promise to afford such extensive benefits to the part of the state where the trust is to be carried into execution. But this very circumstance admonishes a judge to be cautious in every step he takes—to recollect that his office is to administer the law as he
(127) finds it, and not as he wishes it to be, and to arm himself with new resolution in a case, so peculiarly calculated to enlist the judgment on the side of the affections.

The subject, too, is in a great measure new in our Courts, and is acknowledged to be entangled with difficulties even in the country when we derive our legal notions; so that it is not easy from the multitude of conflicting decisions, to extract the true principle on which the case ought to be placed.

The bill is filed to attain an account and division of the real and personal estate of *Moses Griffin*, and to have his executors declared trustees for the complainants, who are the heirs-at-law and next of kin of the testator. The bill is demurred to, and the argument has involved many interesting and important topics, towards the illustration of which numerous authorities have been adduced and commented on.

The principal objections to the will are, that it tends to produce a perpetuity; that the objects of the trust are vague and indefinite; and that as it is discretionary with the executors whether they will fulfil the trusts or not, there is no one to call them to account. Hence it is alleged, that the property ought to be given to the next of kin and the heirs.

It is deemed material to remark, in the first place, that the executors do not seek the aid of the Court, at present, to establish the charity, whatever they may do in future; but this application is made by the heirs and next of skin to defeat the will—so that, if the trust be valid at law, and the objects of it sufficiently certain, it seems superfluous to enquire into the powers of the Court, in relation to charitable devises and bequests; for if it were conceded that a Court of Chancery in this State is invested with no such jurisdiction over such subjects, yet, if the disposition of the will is valid at law, the demurrer must be sustained, and the executors left to manage the fund in such way as the law prescribes and
(128) under such protection as it affords. If the trust were

unlawful, the Court would decree the property to the Complainants, as in the case of *Craven's* will; but if it be lawful and sufficiently definite to be carried into execution, it cannot be subverted in this Court.

There is no principle of law which forbids the appropriation of property to charitable uses, since the power of alienation was introduced. A devise to individual trustees, by name, for any purpose, not made unlawful by the statutes of Mortmain, has ever been deemed valid since the statute of wills, independent of the 43d Eliz. The Civil Law was distinguished for the protection it afforded to such bequests; and the first dcisions under the statute of wills were probably influenced by a like disposition in the Courts. To maintain a charity expressly declared by the testator, seems to follow naturally from the former power of the Ordinary to apply a part of every man's personal estate to charity. *White* v. *White*, 1 Bro. C. C., 12; *Maggridge* v. *Thackwell*, 7 Ves., 36, 69. In *Porter's* case, 1 Rep, 22, the devise was to the wife, on condition that she should grant the lands for the maintenance forever of a free school, which the testator had erected, and of alms-men and alms women attached to it. By those who argued in support of the devise, one reason given was, that the statute of Hen. VIII. avoids superstitious and not charitable uses. Another was, that if it extended to this, it made the use, and not the conveyance, void. And the devise was sustained by the Court. The condition was held to be a lawful one, and such as the trustee might execute. It was because the condition was not performed, that the heir was permitted to enter. This case is commented on by the Chief-Justice of the United States in the *Baptist Association* v. *Hart's executors*, and it is taken for granted, that the trust was a lawful one, and might have been performed.

(129) In enumerating the trusts not executed by the statute of uses, Sanders (p. 62) puts this case—If a man enfeoff two or three persons and their heirs *in trust*, and to the intent that the inhabitants of such a place should have a free school, or in trust to maintain poor children, this trust is not executed by the statute of 27 Hen. VIII, for the land must remain in the trustees to answer the purposes of the trust, and, therefore, not a use executed by the statute. One reason for this construction is because a *use* cannot be limited to a parish or any indefinite multitude, by a general name, it being no corporation, and without any

public allowance. But this limitation of the use *is good as a trust.* Another reason, because it is a rule in Chancery, that where lands are given to trustees in trust to pay the profits over, the lands must continue in the trustee, in order to perform the trust.

These two instances of valid trusts at law, where the objects of the trusts are not more certain, and in the last case, less so, than in that before us, shew that the will is sustainable at law.

In the case before cited from Wheaton's Reports, the bequest was to the Baptist Association that for ordinary meets at Philadelphia annually, for the education of youths of the Baptist denomination; and it was held that the association, not being incorporated at the testator's death, could not take the trust as a society. The Chief Justice observes, "The *cestui que trust* can be brought into being only by the selection of those who are named in the will to take the legacy in trust; and those who are named are incapable of taking it." In the case before us, on the contrary, the executors are capable of taking the estate in trust, and are therefore capable of selecting those who are to be benefitted by it. If, then, the widow in *Porter's* case might lawfully grant the land for the maintenance forever of the free school and of alms-men and alms-women; and the feoffees in the case from *Sanders* might lawfully provide a free school or maintain poor
(130) children. I cannot perceive any reason why the executors in this case may not purchase land, erect a school, and select the poor children to be educated and bound out. The trust may be carried into complete execution by an act of incorporation, as was suggested in *Porter's* case; and by the same means also the objection may be obviated that there is no person to call the executors to account. This inconvenience, however, arises from the act of the testator himself, who may fairly be presumed to have known where he might safely confide so large a trust; and, as he might have given the property absolutely to the executors, no reason is perceived why he might not invest them with discretionary powers for so beneficent an end.

It is true, that a Court of Equity assumes a control over trusts in general, and if the objects be uncertain, will consider the property undisposed of for the benefit of the heirs and next of kin. But here the objects are distinct, viz: the education of poor children and the binding them out as

apprentices. As all the poor children in that part of the country could not receive the benefit of the fund, a discretion was necessarily confided to the executors to select such as stood in need of that aid. Without so much discretion as this, no charitable institution could ever have been established; for though it might be possible for a testator to designate existing objects, how could he point out those hereafter to be admitted.

The devises and bequests are next objected to on the ground that they tend to a perpetuity. The meaning which the law annexes to this term, is that an estate tail so settled that it cannot be undone or made void. As when, if all the parties who have interest, join, they cannot bar or pass the estate; but if by the concurrence of all having the estate tail, it may be barred, it is not a perpetuity. It is in reference to estates tail, that the word is used in the Bill of Rights; for there was no other estate that had a tendency that way. A condition not to alien, annexed to a fee simple, is void; (131) and the rules relative to executory devises, by which their duration is limited, had effectually checked their tendency to a perpetuity. In obedience to the declaration of the Bill of Rights, and to the injunction in the Constitution, the Legislature of 1784 abolished entails—giving as a reason that they tended to raise the wealth and importance of particular families, and to give them an undue influence in a republic. This shews plainly that they designed to prevent the accumulation of individual wealth, and did not contemplate the possibility of any evil likely to arise from the establishment of a permanent fund for charitable uses. The probable effect of this was the reverse of what they meant to guard against, as it promised to increase the equality of the republic. It would afford the means of instruction to those who could not otherwise procure them; it would diffuse knowledge and morality amongst that class of society which stands most in need of them, and, by rendering them useful and efficient members, add to the strength and happiness of the community. Assuredly, then, property applied to these ends never entered into the Common Law notion of a perpituity: otherwise the objection would have been taken in Porter's case, and the many others to be found in the books where similar dispositions have been made. The Common Law has always been adverse to perpetuities, and it is acknowledged on all hands that executory devises,

on account of their tendency that way, are not the legitimate offspring of it, but a privilege gradually insinuated into its system. The opposition to mortmain did not arise from the mischiefs likely to ensue from the stagnation of property, but from the loss occasioned to the Barons of the profits of their tenure. It is true, that one of the last mortmain acts in England recites this as an evil; but that proves that it was not an inherent objection to such dispositions in point of law, otherwise they would not have subsisted for so long a period. I am thus led to conclude, that a perpetuity which the law would deem void, must be an estate so
(132) settled for private uses that by the very terms of its creation there is no *potestas alienandi* in the owner. There is no such restraint imposed upon these executors. They, like other trustees, may sell for a valuable consideration; but whether the purchaser can acquire such a title as will prevail against the *cestui que trust*, will depend upon his having notice—an incidental circumstance wholly independent of the right of selling.

The next enquiry is, whether a Court of equity in this State has jurisdiction of the subject. At the period of the first settlement of this State, then a colony, the Chancery in England was in the regular exercise of jurisdiction over charities, under the 43d Elizabeth. A similar Court was established here by the Lords Proprietors, under the general powers given them by the charter. It was held by the Governor and Council, and continued until the year 1777, when the separation from the mother country took place. The following year, the Legislature declared all such parts of the common law to be in force, as were heretofore in force and use within this territory, or so much as is not inconsistent with the independence of the State. Under a similar provision in the laws of New York, Chancellor Kent thought the equity system was of course included. *Manning* v. *Manning*, 1 Johns. Ch. Rep., 535. From the Revolution to the year 1782, there was a suspension of equitable remedies, and sometimes of legal ones, from the Courts of justice being shut up. Equitable rights continued to subsist notwitstanding; and in 1782, Courts of Equity were established, with all the powers and authorities that the former Court of Chancery used and exercised, and that are properly and rightfully incident to such a Court, agreeably to the laws in force in the State, and not inconsistent with the Constitution. That the

cognizance of charitable devises and bequests was taken by the Chancery in England, and that it was a power "rightfully incident" to such a Court at the date of the charter, is shown by the adjudged cases—whether the Court of
(133) Chancery in this State actually exercised a similar jurisdiction, there are now no means of ascertaining.

The objection in this case is founded on the peculiar nature of the subject as it is viewed by the laws of England. It is laid down in the books, that the king, as *parens patriæ*, has the general superintendence of all charities not regulated by charter, which he exercises by the keeper of his conscience, the Chancellor; and, therefore, the Attorney General, at the relation of some informant, where it is necessary, files *ex officio*, an information in the Court of Chancery to have the charity properly established and applied. 3 Bl. Com., 427; 2 Fonb. Eq., b. 3, c. 1. It is also said, that the jurisdiction thus established, does not belong to the Court of Chancery as a Court of Equity, but as administering the prerogative and duties of the crown; and that the duties vested in the Chancellor by the statute of Elizabeth are personal, and not in his ordinary or extraordinary jurisdiction in Chancery—the same, in fact, which he exercises with respect to idiots and lunatics. Admitting this to be so in the broadest terms, it does not, to my mind, present any real difficulty to the like power being exercised here. It opens a wide field of investigation, which I have reflected upon, but which I do not think it essential to enter into. The short ground upon which I should place it is, that, upon the revolution, the political rights and duties of the king devolved upon the people of this State in their sovereign capacity. That they, by their representatives, had a right to deposit the exercise of this power where they pleased, and that they have placed it in the hands of the Courts of Equity. Whether this be a correct view or not, does not affect the principle of my opinion in this case; because, I think, that where there is a trust and a trustee, with some general or specific objects pointed out, or trustees for general or indefinite charity, a Court of Equity may, as a matter of trust, take cognizance of
(134) it in virtue of its ordinary jurisdiction. This position is maintained by the authorities quoted in a learned note to the appendix of the 4th volume of Wheaton's Reports; which cases I have examined as far as I have had access to them—some in the reports, and others in abridg-

ments. The cases further shew, that in indefinite trusts, or trusts where some general objects are pointed out, the distinction most acted upon is, that in a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual. But where the execution is to be by a trustee, with general or some objects pointed out, the administration of the trust will be taken by the Court of Chancery, either as delegate of the crown, or as a Court of Equity, and managed under a scheme reported by a master and approved by the Court. 7 Ves, 36, 86; 1 Merir., 55; 14 Ves., 364; 15 Ves., 231; 17 Ves., 371; 16 Ves., 206.

I am consequently of opinion, that the demurrer be sustained, and the bill be dismissed.

HALL, Judge, dissented. He said, that writers on the English Court of Chancery divide its jurisdiction into four parts: the common law jurisdiction; the equity jurisdiction; the statutory jurisdiction; and, lastly, the specially delegated jurisdiction.

The subject-matter of this bill cannot fall within the first. If it fall under the second, it must be under that division of it which we call *trusts*. In that light, it must be regarded merely as a trust, and unconnected with the statute of the 43d Elizabeth. In order that it may be supported on that ground, there must be trustees, and a trust to some person or persons, or to some particular definite object, marked out so that the trustees can be compelled to carry the trust into effect by those who are the objects of it. Here there are trustees; but it depends upon their will and discretion to point out and select persons as objects of the testator's bounty.

There is no *cestui que trust*, who can call for the execu-
(135) tion of the trust. The charity cannot, therefore, be carried into effect and established independent of the statute of Elizabeth, for want of an equitable devisee. Another objection to this devise is, that it cannot be sustained at law. Our Bill of Rights declares, that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed. And the 43d section of the Constitution declares, that the future Legislature of the State should regulate entails in such manner as to prevent perpetuities. At that time, perpetuities appeared most prominent in estates tail, and the clause in the Constitution just recited was inserted with a view to them. But the clause in the

Bill of Rights was inserted to prevent perpetuities generally. To make the present devise sustainable, it must harmonize with that high authority. If the trustees die, the legal estate given to them will pass into other hands, and, in contemplation of law, will last forever. And the trust, which cannot exist without it, and is wholly dependent upon it, will have a co-equal existence. Thus a portion of property would, by a decree of this Court, be locked up forever, and withdrawn from any ownership by which it might be aliened. It cannot be disposed of without a breach of trust, except such disposition be for the benefit of the charity. It cannot go in debt. It is doomed to its course, and will admit of no deviation. It is not a good executory devise, which may last for a life or lives in being and twenty-one years afterwards: but is a devise that may last forever, and must not be interrupted. The devise may be laudable; but the end cannot sanctify the means. Were these trustees a corporation, these objections might vanish. But this Court, in the exercise of its ordinary powers as a Court of Equity, does not possess the power of creating corporations.

I will now enquire, for a moment, whether this case falls within either the third or fourth division of the Chancellor's jurisdiction; and this enquiry I will make as to both at the same time.

The King, as *parens patriæ*, has the general super- (136) intendence of all charities, which he exercises by his Chancellor, the keeper of his conscience. The Chancellor possesses and exercises this power by virtue only of such delegation; and such power thus delegated, is the foundation of which the statute 43 Eliz., c. 4, is the superstructure. To that power of superintending charities which the Chancellor, as the keeper of the King's conscience, possesses, the statute adds the power of enquiring into all abuses of charitable donations, and rectifying the same by decree. Thus, then, the power which the King possesses of creating corporations, the power which he delegates to the Chancellor, of enquiring into abuses of charitable trusts, and correcting the same, are powers, when united, sufficient to determine all questions relative to charities; and sufficient to establish corporations, and then vest in them all donations agreeably to the will of the testator or donor. In the case before us, the trustees could be converted into a corporation, and the property vested in it, to be applied as the

testator has directed. In that case, there could be no objection to it as a perpetuity. Our Court of Equity, clothed with all the power which the statute of Elizabeth could give, cannot create a corporation.

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(137) THOMPSON *v.* ENGLAND.

*From Burke.*

IN EQUITY.

D. entered a tract of land in 1777, which T. claimed in virtue of an improvement and occupancy: T. could not caveat the entry, because he would not take the oath of allegiance to the State, and, for that reason, he assigned his right to M. who was to enter the caveat at the expense of T. and in trust for him. M. caveated and finally obtained a grant, and T. filed his bill for a conveyance. The bill is dismissed, because the acts of April, 1777, and November, 1777, expressly require the oath to be taken by all persons who enter land, and T. could not, therefore, have made the entry or caveat himself; and the agreement between him and M. was an evasion of those acts, and a fraud upon the State.

The bill charged, that in 1775, one Killian was entitled to four hundred acres of land in Burke, then Rowan county, by virtue of an improvement thereon of a cabin, orchard, and ten acres of cleared and cultivated land, and sold it to Complainant for 55*l.* paid to him, who took possession in 1776. That soon after the land-office opened in 1777, one Duckworth entered two hundred acres, part thereof, and that Complainant "not then having taken the oath of allegiance to this State, could not caveat the entry;" but, to prevent Duckworth from getting a grant, he applied to one M'Kenny to befriend him, and it was agreed between them, that M'Kenny should caveat the land in his own name, and at the charges of Complainant, and that the grant should issue to M'Kenny in trust for Complainant: and, "in order to give M'Kenny the apparent right," Complainant assigned to him the right of entry for the land, and took his bond for 250*l.* as the purchase money, though the same was never to be paid, and never had been paid, and was now ready to be surrendered. The bill further charged, that M'Kenny did caveat Duckworth's entry, and obtained a verdict in (138) his favor, and judgement for a warrant to issue in his name, and that Complainant paid all the expense: That Complainant "afterwards became a citizen of "this

State," and thereby became entitled to the land—but that M'Kenny, about the year 1780, sold or assigned his entry to one Alexander, who obtained a grant, and sold or assigned the land to the Defendant, and that each of them had notice of the trust, and paid no valuable consideration :—and prayed for a conveyance and account, and to be let into possession.

The answer admitted the caveat and the transaction between Complainant and M'Kenny, but insisted that it was an absolute sale, and that M'Kenny had offered to pay the purchase money in 1778, but that Complainant refused to receive it, on account of the depreciation of the paper money. It was also insisted, that the sales to Alexander, and by him to the Defendant, were *bona fide*, for a valuable consideration, and without notice of any equity in Complainant, and that they had been in possession from 1781, to the time of filing the bill, which was in September, 1799.

The case was transferred to this Court under the act of 1818, and now came on for a final hearing.

Wilson appeared for the Complainant; and A. Henderson and Gaston for the Defendant.

HALL, Judge, delivered the opinion of the Court:

An act of Assembly passed in April 1777, prescribes an oath of allegiance to be taken to the State by all persons living therein. Another act, passed in November of the same year, established offices for receiving entries for claims of land in the several counties in the State, and declares, "that it shall and may be lawful for any person, who is or hereafter may become a citizen of this State, and performs the requisites by this act required, to enter with the entry-
(139) taker of any county, a claim for any vacant lands lying in such county :"—and, by the fourth section, "every person but a guardian for an orphan, or a person absent in the military service, before he shall enter lands, shall take and subscribe the oath of allegiance and abjuration prescribed by the laws of the State;" which oath the entry-taker is to administer. It appears from Complainant's own shewing, that at the time when the entry was made under which he claims, he had not taken the oath of allegiance prescribed by law, and which was indispensibly necessary, before he could make an entry. This he knew very well—He was fully sensible of his own incapacity, when he applied to M'Kenny to caveat Duckworth's entry, and when he clothed him with

power to do so successfully, by conveying to him Killian's improvement, which he had before purchased.

I am of opinion, that if he was not qualified to make entries and hold titles to land himself, he could not do it by the agency of another person. The sound policy of the times forbade it. It was entirely against the spirit and meaning of the laws. It matters not that he has since taken the oath of allegiance—if his claim was originally invalid, that circumstance will not make it good. He will not be allowed to take his chances and then side with the strongest. For these reasons, the bill must be dismissed with costs.

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(140) AVERY *v.* WALKER.

*From Buncombe.*

IN EQUITY.

W. A. made an entry of land, paid the fees and the purchase money, and got a warrant of survey, and applied several times to the county surveyor to make the survey, but he declined doing it, and made W. A. a deputy for that purpose, just before the entry would lapse. W. A. proceeded to make the survey, as deputy, returned it into the office, and obtained a grant. F. W. had entered the same land with notice of W. A's entry, and, being also a deputy surveyor, fraudulently made out a plat of survey from W. A's field book, which he returned into the office, and obtained a grant prior to that of W. A.

W. A. filed a bill for relief and a conveyance of the legal title from F. W. He did not state that either he or the chain carrier had been sworn.

*Held*, that W. A. was not entitled to relief, and his bill dismissed—because the survey had been made by himself, and not on oath.

*Quere*—Whether the extinguishment of the Indian title, by the treaty of Holston, made in July, 1791, with the Cherokee Indians, rendered the lands ceded by that treaty subject to entry in this State, without a further and express Legislative act?

This case was transferred under the act of Assembly of 1818, to this Court for a final hearing.

The bill stated, that the complainant on 22d day of April, 1795, made and paid for an entry of land in the following words: "No. 3626: W. Avery enters a claim for 400 acres of land lying in Buncombe County on both sides of a large creek or river that falls into Tuckasejah river on the north-east side, at the Twelve Mile Town: the said creek called Big Creek by some—by whatever name or names the said

town or creek may be called by others: Beginning immediately above where the Indian line, by the treaty of Holston, made in the year 1791, crosses the said creek, or on that part of the said creek nearest to the Indian line, and extending upon both sides of the said creek for complement." That he then also made seven other entries, which are par-
(141) ticularly set forth in the bill, each for 400 acres, and each calling to lie, above the last in order, on the same creek called, by him, Big Creek, and extending up the creek on both sides of it for complement: That on the entry book, at the foot of his said entries, were written the following remarks, viz. "1. *Nota Bene:* It is supposed that the Indian line does not cross any other water course as large as Big Creek between Big Creek and the territorial line." "2. *Nota Bene:* No other water courses falling into Tuckasejah or Tennessee as far west and as large as Big Creek, lie in that part of North Carolina wherein the Indian claims were extinguished by the treaty of Holston in 1791:" That in May, 1796, he paid into the public treasury the purchase money to the State, and took a receipt therefor: That at the time he made the entries, the country was wild and infested with Indians, and that he had never seen the lands or been near them: That he obtained the locations from Col. James Hubbard and Capt. John Hill, who had been members of Col. George Dohorty's party, and explored that section of country shortly before, and had been attacked by the Indians on that creek and at or near the place where his first entry was laid: That he made repeated applications to John Patton, surveyor for Buncombe County, to survey the lands after obtaining the warrants; and that Patton declined doing it, as the lands were on the frontier and the Indian boundary had not then been actually run out, and it might be dangerous to survey near the line: That Patton offered to make a deputy to survey the lands; that none could be obtained except the complainant himself; and that in consequence thereof, he accepted a deputation in 1798: That in November, 1798, he sat out from Burke (where he resided.) to make the survey; but he then again applied to Patton, and requested him to make the survey, and he again refused: That the period was near at hand when the entries would lapse or become forfeited to the State if the surveys were not made, and he was under the necessity, therefore, of
(142) doing it in person: That he procured one Dever as

a pilot and chain-carrier, who had been a huntsman, and was well acquainted with the woods and water courses in that part of the country, and could identify the creek mentioned in the complainant's entry: That when they reached the wilderness they met with the defendant Felix Walker, who informed complainant that he had several entries on a creek called Soko, which he had come out to survey under a deputation from Patton to himself, and proposed that complainant should survey his, the defendant's entries, and the defendant in turn would survey as many for the complainant; to which, both parties agreed: That Dever them to Soko Creek, being the main south fork of Big Creek; and that on the 14th November, 1798, complainant made several surveys for the defendant, running down the creek to a point within one mile and a half of its mouth, and that he then shewed to Dever and the defendant, Walker, exact copies of his entries, and stated that the Big Creek called for in them and designated to him by Hubbard and Hill, was the creek on the banks of which Dohorty had been attacked by the Indians: That Dever declared that Soko emptied itself into that creek, and that Dohorty's battle ground was, in fact, at the mouth of Soko: That above the mouth of Soko, the Indians called the creek Raven's Fork; that *below* the confluence they called it Uunia and Nonahut; but Dohorty and his men, and other whites, called it Big Creek: That complainant also shewed to the defendant a copy of the *Nota Benes*, and the original receipts of the entry taker and treasurer for the fees and purchase money, and stated to him that he had never been upon or seen the lands, and depended upon Dever to shew them: That Dever repeated his declarations several times in the presence and hearing of Walker, and asserted that they were then near the land entered by complainant: That Walker, deceitfully, and for purpose of defrauding complainant of his land by inducing
(143) him to survey it and certify for him instead of the Complainant himself, denied the correctness of Dever's opinion, and said that the large creek into which the Soko fell was not Big creek, called for in Complainat's entries and warrants; that the true name of that creek was Oconalufty, and it was excluded by the *Nota Bene* annexed to the entry; for there was another creek lower down, which was much larger, and fell into the Tuckasejah on the north-east side, fifteen miles below, near the Big Bear's village,

and was called Deep creek; that he had lately been there and seen it, and there were much larger bodies of good land on it than on the creek where they then were: that there was no town or Indian old fields at the mouth of *this* Big creek, or Oconalufty, as he called it, but there were at the mouth of the other creek: that he moreover declared, that he had lately seen and conversed with Hubbard and Hill, and others of Dohorty's men, who had removed to Tennessee, and at a great distance from Complainant, and that they had all stated that Complainant's land was situated fifteen miles below, and on the other creek: and that he was willing to make oath to the truth of all these statements and facts; that he, the Defendant, had entered the lands on Soko and the creek into which it emptied, and which was named Oconalufty: That Dever asserted the truth of his own declarations, and that Complainant, being uncertain which to credit, proceeded in the surveys, with the determination of making plats and certificates of survey, according to his convictions resulting from subsequent investigation: That in fact, all the representations of the Defendant were false, and were so known to himself at the time he made them; that there was no other large creek emptying into the Tuckasejah on the north-east side, below this Big creek; that Big creek corresponded with the call for the Twelve-Mile Town; that the attack on Dohorty was made at the mouth of Soko; that the true name was not Oconalufty, and that such
(144) name had been given to it by the Defendant himself, when he made his entries, for the purpose of defeating Complainant's entries; that Defendant had notice of Complainant's entries, and that all his declarations aforesaid were made with the view of entrapping him, by getting him to survey his own lands for the Defendant; that a water course fifteen miles below would not fall into the Tuckasejah at all, but would fall into the Tennessee river. The bill further states, that Complainant ascertained these facts during the surveys by his own observation, aided by the knowledge of Dever; and that he thereupon distinctly informed Walker that he would make plats and certificates for him for the lands on Soko, and for himself for those on Big creek, below the mouth of Soko, and on the Raven's-fork, above the mouth of Soko: that much altercation took place between them, and that Walker, still insisting for the surveys to be made for him, remained with Complainant dur-

ing the surveys, and thus had an opportunity of taking notes of the surveys himself, or of copying them from Complainant's field-book: That after the surveys were completed, they separated—Complainant returned to Burke, and Walker to his residence in Rutherford county: That in a few days, the Defendant sent a messenger to the Complainant, with a letter requesting him to make out the plats and certificates of survey for all the lands, in the name of the Defendant, or, if he would not do that, he requested him that, after he had made them out as he might think proper, he would take Defendant's house in his way to Raleigh, that they might accompany each other to the public offices, to contest the right to the grants: That the said letter was a mere device to deceive Complainant; and that Defendant instructed his messenger to detain Complainant at home as long as he could, in making out the plats and certificates, or by any other pretence, until he, the Defendant, could make out plats and certificates in his own name for the lands, and, without any notice to Complainant, forward them to (145) the Secretary's office and obtain the first grants: That, in fact, the Complainant made plats and certificates in Walker's name for all the lands on Soko, which he sent to him by his messenger, and proceeded to make out plats and certificates in the name of himself, the Complainan , for the lands on Big creek, including the mouth of Soko: That in a short time, he completed his plats and certificates, and filed them in the office of the Secretary of State, and obtained grants for the respective tracts, bearing date the 24th day of December, 1798: The bill further states, that the Defendant, Walker, in pursuance of his original scheme of circumventing and defrauding the Complainant, had, in the meantime, and while he and his messenger were amusing him at his own house with invitations to travel together to Raleigh, and employing him in making out the papers for the Soko lands for Walker, and soliciting him to make out those for the Big creek lands in the same way, been busily engaged himself in making out plats and certificates for the latter lands in his own name; that, in truth, he did so make them out, and, before Complainant had completed his, and without any knowledge or suspicion of it on his part the Defendant posted off one James Holland, an attorney, to Raleigh, to procure the grants, and did obtain grants, bearing date the 5th day of December, 1798, for

3,832 acres of land in his own name, and for 640 acres in the name of Holland, as a compensation for his trouble, or as his share of the profits. The bill further states, that the entries of Walker were made on the 9th day of May, 1795, and that he then had full notice of Complainant's previous entries, as well as at the time of making the survey, and that he, the Defendant, had not paid the purchase money to the State before he applied for his grants.

The prayer was, that the grants to Walker might be declared void; or that he should convey to complainant
(146) the lands in dispute, and surrender his grants into Court; and for an account of rents, profits and waste.

The answer was much in detail, and denied many of the allegations of fraud stated in the bill. The reliance, however, was chiefly on the position, that Big Creek and Ocanalufty were two different and distinct branches of the Tuckasejah river, and that the information given by the defendant to Avery upon that point, was correct in point of fact: It also insisted, that the surveys had been actually made by complainant for the defendant, and that he had no suspicion that complainant designed to appropriate the land to himself until the surveys had been completed. When Avery informed him of his intention, he was much astonished, and, having no other means of defeating Avery's fraudulent purpose, he determined to exercise the functions of his office of deputy surveyor, for himself, and thereby secure this land from the unjust spoliation meditated by the complainant: He admits that he hurried home, and immediately on his arrival, proceeded to prepare plats and certificates for himself, for the lands on the Oconalufty, with which he despatched Holland to Raleigh, in order to have the titles quickly perfected by grants; which was accordingly done, as stated in the bill: He also admits that he sent the messenger to Avery for the plats and certificates, and says, "that with honest truth he declares that he had a design to procrastinate and prevent the complainant from obtaining grants first, and that he also had it in view to obtain the titles for himself, as he believed the lands to be justly his." By engaging the defendant in platting the Soko lands, he hoped to detain him, and thereby gain time for himself. He also wished to put an end to all controversy and law suits upon the subject, which he hoped to do by getting the first grants, as he expected that complainant would then abandon his

claim: "Actuated by these pure motives, he had in view only to prevent the complainant from committing a
(147) fraud on him, and not himself to perpetrate one: He therefore determined to obtain, by any fair means, the first grants." Holland had then gone to Raleigh, and he wished to detain complainant until the business could be completed. The defendant insists that he acted *bona fide* throughout; and denies that he had notice of complainant's entries on Oconalufty, but says that he conceived then and now asserts that they were on *another* creek.

The proofs and exhibits were voluminous: but as the case was decided upon a motion to dismiss the bill upon the matter stated in it, the report is not burdened with the other matters.

The lands entered by both parties are stated in the bill to be within the territory ceded by the Cherokee tribe of Indians to the United States by the treaty made the 2d day of July, 1791, commonly called the treaty of Holston or Blount's treaty.

Upon the hearing, Mordecai and Seawell, for the defendant, moved to dismiss the bill upon two grounds: First, because the land was not subject to entry: Secondly, because the complainant surveyed his own entries.

The act of 1778, c. 3, ascertains the Indian boundary, and declares "that all entries or surveys heretofore made, or which hereafter may be made within the said Indian boundaries, shall be utterly void, and of no force or effect." By the act of 1783, c. 2, certain lands are reserved to the Indians, and entries within the reservation declared void, and a penalty of £50 imposed for each entry, on the person making it.

These lands were once, therefore, not the subjects of entry—the statutes forbade it. They have not yet lost their efficacy. There is no time limited in them during which they should operate, and afterwards expire; they do not provide that "so long as the Indian title shall exist, no entries shall be made." If the Courts say that, they impose a limi-
tation to the law, where the Legislature have placed
(148) none, these acts have not been expressly repealed; nor are they repealed by implication—by subsequent laws inconsistent with them. The extinguishment of the Indian title by the treaty of Holston, did not affect the oper-

ation of these prohibitions. That treaty did not repeal our laws: it was not made by North Carolina, but by another government—that of the United States. Besides, these acts do not forbid entries within the Indian boundary, *merely as Indian boundary*. There are defined territorial limits, and all entries within them are prohibited; and, although those limits then constituted Indian boundary, it does not follow that when their title should cease, the prohibition would also cease; the State might not wish to sell that land, and there has been no declaration of the legislative will to that effect. The repeal of these statutes being to exercise the highest act of sovereignty, by disposing of the territory of the State, nothing short of the express words of the Legislature is sufficient therefor. It is natural to expect that a change of so much importance, should be plainly and expressly declared. This question seems to have been settled in the case of *Avery* v. *Strother*, Conf. Rep, 441. It is true, that the entry there, was made between the signing and the ratification of the treaty; but the Court does not lay any stress on that circumstance, nor intimate that the judgment would have been different had the entry been made after the ratification. That case has been recognized as law by the Supreme Court of the United States, and made the foundation of their opinion in *Danforth's lessee* v. *Thomas*, 1 Wheat. Rep., 158; in which it is declared, that the mere extinguishment of the Indian title did not subject the land to appropriation, until an act of the Legislature should authorize it.

But this land was not the subject of entry for another reason. The right of entry is given and regulated by the act of 1777; c. 1, s. 3: a mere perusal of which, will shew, that the land in question could not be entered. The words are,

"that it shall be lawful for any citizen fo enter with (149) the Entry taker of any County in this State, a claim for any lands lying in such County, *which have not been granted by the Crown of Great Britain, or the Lords Proprietors of Carolina*, or any of them, in fee-simple, before the 4th day of July, 1776, *or which have accrued, or shall accrue* to the State by *treaty* or *conquest*." These words "which have accrued or shall accrue by treaty or conquest" are words of exception, and not words of grant: such is the natural construction of the sentence, and any other would produce an absurdity. The first part of the section authorizes an entry of any lands in any County in the State. These are

general words, and embrace all the lands in the State; the expressions, therefore, relative to ceded or conquered territory, cannot be construed words of grant; for there is nothing for them to operate on. They could not apply to lands without the State: such a case was not at all contemplated. Indeed, it is expressly provided, that the entry shall be made with the Entry-taker of the County, of all lands within that County. The treaty of the *Long Island of Holston*, was made on the 20th of July, 1777, by which certain lands were secured to the Indians; and it neither comported with the policy of the country, as declared in the preamble of the act, nor with the provisions of the treaty, to subject those lands to entry. That treaty was fresh in the minds of the Legislature, and probably, suggested the exception. It is true, that speculators spied out an apparent ambiguity in the expressions, and some of them immediately made entries. But very soon afterwards, we find a legislative construction upon the clause in question, corresponding with that now contended for. By the act of 1778, c. 3, entries within the Indian boundary, are prohibited thereafter, and all entries and surveys of land within those boundaries made *before* that time, are *declared* void, and the purchase money refunded. Whatever conflict of authority there may be upon the construction of the acts of '78 and '83, there is none upon the point arising out of the act of '77. That is now (150) presented, for the first time, in this State, and the Court can give an exposition of the Statute, untrammelled by any precedent whatever.

Upon the second point, they urged it as a general principle, that a confidential agent shall not act for himself, in relation to the matter entrusted to him by his principal. Sugd. Vend., 504. A Sheriff cannot purchase at his own sale; 2 Hayw., 336; Conf. Rep., 551; nor can an Executor. 18 Ves., 170; 1 Mad. Eq., 91; 2 Hayw., 101, 108. These cases do not go on the ground of a supposed incongruity of the same person being buyer and seller. The reason of them is, that as buyer, he has a personal interest to purchase as low as possible; and as seller, he is acting for another person who has an interest directly opposite. His purchase is set aside, because it is against policy; because, if supported, frauds *might* be committed by Trustees, not because he, as Trustee, has actually committed fraud. It makes no difference whether the transaction be honest or not: *Ex parte Bennet*, 10 Ves.,

385. This reasoning applies in this case. It was the interest of the State that an exact admeasurement should be made. The Surveyor is entrusted, on the part of the State to make it: but it is his interest, when surveying for himself, to include as much land as possible. If such a purchase be good at Law in any case, yet Equity will interfere and give the benefit to the *cestui que trust*. But such transaction will be avoided at Law as well as in Equity, if the Court of Law can get at the facts. *Meelor* v. *Kimball*, 1 L Repos., 157. And when the purchase is made of a third person, and it cannot take effect for the benefit of *cestui que trust*, it is absolutely void in Equity; for the Trustee shall never take benefit from it. *Ex parte Bennet*, 10 Ves., 385; 1 Mad. Eq., 92, 93; 7 Bro. Post. Cases, 367; 1 Sch. and Lef. Rep., 131. This principle has been extended to public officers. A *Latitat* directed to the sheriff, in his own case, was held ill. 1 Wm. Bl. Rep., 506; Com. Dig. Title, *Viscount*, E. (151) That must be upon the ground of interest. There is no difference between a Sheriff and Surveyor. The Surveyor, by accepting the office, relinquishes the right of making surveys for himself; because it is inconsistent with his office. Nothing short of express words in the Statute, should give a power so manifestly against the general policy of the country, and the general principle of right. If nothing he said in the act of Assembly, the general principle operates and excludes him: but the act does negative the implication of such a power. The 5th section speaks of the party entering, and the Surveyor, as distinct persons; the 12th section gives fees; and the 13th and 14th sections require a bond from the Surveyor, and prescribe an oath, and authorize the party injured to put the bond in suit. The Legislature endeavors to secure impartiality, by compelling the Surveyor to act without partiality. Can it be held, then, that he shall be allowed to act for himself? General words in a Statute, which if construed generally, will produce absurdity, injustice or inconvenience, will be corrected by Equity. 2 Plowd., 465.

*Gaston* and *Wilson*, for the complainant.—The act of '77 opened the whole State for entries. The policy of the State was to have all the vacant lands appropriated, and that act was intended to provide for it in the full extent. The broad terms of it embraced even the lands that had been expressly

reserved to the Cherokees by the treaty of July, 1777. That was soon perceived, and the act of the subsequent year, st. 1778, c. 3, was passed to remedy that error, and fulfil the treaty. The Land-office was shut by the act of 1781; but was again opened by the whole State by that of 1783, c. 2, reserving the Indian lands, as defined by the treaty. It is obvious, that the object was to reserve these lands, *as* Indian lands, from entry; because all the lands to the east
(152) were then within the white settlements and subject to entry, and by the third section of the act, the western boundary for entries is enlarged to the Mississippi. The general construction then was, that those lands could be entered, unless expressly prohibited. Hence the necessity for the passage of the act of 1778; and hence, too, the necessity for the restrictive clauses in secs. 4, 5, 6, 7 and 8 of the acts of 1783 The cases of *Preston* v. *Browder*, 1 Whea. Rep., 115, and of *Danforth* v. *Thomas*, *Id.*, 155, do not oppose this position. The entries in both of those cases were made at a time when they were expressly forbidden. The same remark is applicable to the case of *Avery* v. *Strother;* because the treaty did not become consummated, and was, indeed, no treaty until it was ratified. The circumstance of the restrictive clauses being introduced into the act of 1783, shews very clearly, that without them it was considered that the Indian lands would be subject to entry even while occupied by the Indians To prevent that, and that alone, was the intention of the Legislature, so far as regarded the Cherokees It had always been practiced in this State, to make entries of any lands to which the Indian title had been extinguished; and also to enter lands, even on which the Indians were actually seated. This custom had the sanction of legal provisions, as is proved by the act of 1748, respecting the Tuscarora tribe; whereby entries of their lands were forbidden in future, but the previous grants declared valid, and the grantees authorized to enter, whenever the Indians should desert the lands. This is incontestibly confirmed by the act of 1809, c. 16, which is a legislative exposition of the former laws, and declares that the Cheorokee lands could be appropriated by entries of individuals, "so soon as their title should be extinguished by treaty," though it was then unlawful to make such entries; and, to arrest the speculation on foot, to enter all the valuable lands as soon as a treaty should be made, it is enacted, "that those lands shall not be subject to

(153) be entered; but, *when the Indian title shall be extinct, they shall remain and enure to the sole use of the State.*"

The construction attempted to be imposed upon the act of 1777, respecting the lands that might accrue by treaty or conquest, is not correct. It is contradicted by the case of *Preston* v. *Browder;* in which those words are distinctly considered as words of grant of all the lands within the territorial limits of the State, then held by Indians, and which might be subsequently obtained from them by cession or conquest: and the ground of decision in that case was, that the entry had been made before any such treaty or conquest, and while they remained Indian lands. But even if those words in the act of '77 operate by way of exception, and not of grant, they will not affect this entry: because the act of 1783 again opens the whole State for entry, without using any such words, and restrains entries only within the Indian lands, as such. The same act of 1809, also supports this construction.

The facts as regards the other points made in the case are, that the complainant made his entries, paid the fees and the purchase-money, obtained warrants of survey, directed to the county surveyor, to whom he frequently applied to execute them, and who declined, and gave complainant a deputation; that complainant waited for the surveyor to make the surveys until a forfeiture was close at hand for the want of surveys; that he again applied, was again refused, and, to prevent a lapse of his entry, finally made the survey himself—his surveys have been certified in to the proper offices and there accepted, and grants thereon issued to him. The defendant, with a full knowledge of his first purchase, and of all the attendant circumstances, has, by spoilation and deceitful practices, contrived to get the first grants

The motion to dismiss upon this ground, can only be supported, because, *by law*, a survey made under any circumstances by a surveyor for himself, however fair, al-

(154) though accepted at the public offices, and approved as the foundation of a grant, is utterly nugatory. It is the business of Courts to expound, not to give law. What says the written law? The act of 1777, c. 1, s. 3, tells us that *any* citizen may enter; of course it is lawful for a surveyor to enter. There is to be but one surveyor in each county—sec. 2—and no provision is made for a deputy. By sec. 14, the surveyor takes an oath and gives bond for the

faithful discharge of his duty. The only mode of ripening the entry into a grant, is upon a survey made by him—sec. 10. By sec. 15, he incurs a penalty of 500*l.* and a forfeiture of office, by any misconduct: And the act in sec. 18, makes a special provision for the entry-taker making entries for himself before a justice of the peace, and prohibits his entering in any other mode: But there is no clause prohibiting entries or surveys being made by the surveyor—there is not an expression or intimation in exclusion of *this* officer: but as far as general words and necessary implication can go, he is permitted to survey for himself. The attention of the Legislature was evidently drawn to the subject—they have made the distinction between the entry-taker and the surveyor, and, it is decent to presume, upon good reasons; but if there be a defect, it is not our duty, nor in our power, to remedy it. The act of 1779, c. 6, authorized the surveyor to appoint a deputy, who should be qualified as his principal, and for whose conduct the principal should be responsible. A deputy may do any act which it is lawful for his principal to do. 1 Salk, 95; 5 Cranch, 243, 248. The acts of Assembly do not, therefore, present any such prohibition.

But it is said to be a principle of the common law, that in all offices of trust, the act of the officer is null where he has a personal interest. Should this even be true at the common law, and as to common law officers, it does not follow that the Legislature may not depart from it as to an (155) office created by statute. The expediency is with them. The express provision made respecting the entry-taker, and the omission as it respects the surveyor, was an adoption of this supposed principle in part, and a rejection of it in part. But there is, in fact, no such principle of the common law. If there be, important, extensive, and highly active as it would be, we should find it frequently stated in judicial decisions, or in authoritative treatises of the law. But nothing like it is found. "No man shall be a *Judge* in his own cause." 8 Rep., 118; Com. Digest, title Justices, 1, 3. This position is admitted. In its terms it applies to *judicial* decisions. It is of the essence of the administration of justice—of the exposition of law—that the arbiter be neuter. Tho restriction of the principle to judicial functions, is a negative as to all others.

Offices are judicial, or ministerial. There are many important distinctions between them. The former cannot be

exercised by deputy, is not grantable in reversion. The latter may be. 1 Inst., 3. b. Cro. Car., 279, 555, 557.

The case of a sheriff has been relied on by the other side, upon the authority of Comyn's Digest, in which it is said that a sheriff cannot execute process in which he is concerned. The office of sheriff is of great antiquity, and is regulated by many rules of which the origin is now unknown, and applicable to it in particular. But the principle thus broadly laid down, must be restrained by the case put in illustration of it. The case is that of an *Extent*, and the only authority is *Moor*. Upon an Extent, the sheriff acts judicially. Bingham, 230-1-2-3. So likewise does he on all inquisitions. Com. Dig. Tit., *Return*, B. 2. The sheriff executes all writs directed to him; but where it is alleged that he is of kin, a party, or partial, they are then directed to the Coroner. 1 Bl. Com., 449; Dyer, 188; Bing., 222. The case of *Weston* v. *Coleson*, 1 Wm. Bl. Rep., 506, cited on the (156) other side, proves that the direction of a writ to the sheriff in his own cause, is irregular, and it will be set aside without costs. But the act is not null; it is only irregular. The rule that a sheriff shall not buy at his own sale, is founded on a different principle than that stated. There must be two parties to every contract of sale and purchase. Parties are essential, and therefore a man cannot sell to himself. The cases referred to by Sugden, establish only a principle in Equity, that a trustee, purchasing at a sale of his *cestui que trust's* property, buys liable to *his* equity, if he come in due time to set it aside. The true doctrine is stated in 5 Ves., 580. If it be objected, that public policy requires such a principle: the answer is, that the judges of policy, and not the Judges of Law, must decide on the force of that assertion. Both tribunals have determined against the existence of such a general principle; and clerks issue writs in their own causes, and record the verdicts and judgments, and keep the records: a Register records and certifies his own deeds: the Secretary of State and the Governor issues grants to themselves: the Speakers of the General Assembly certify their own pay. The case of *McKenzie* v. *Crow*, 2 Bin. Rep., 105, decides the survey to be good, if previously authorized by the principal surveyor, or subsequently ratified by him. Both have been done here; and, indeed, the act of the deputy is that of the principal in every case.

But if the objection be good, this defendant cannot make

it. Both parties have grants for the same land: his, by means of fraud, are of an elder date. The complainant's prayer is to be put into the same state in which he would have been but for the defendant's fraud.

Every kind of artifice by which another is deceived, is a fraud, and Equity has an universal jurisdiction of them, except as to frauds in obtaining wills. 1 Mad. Eq., 203, 205. A (157) verdict, decree, probate, allotment of dower, and fine, obtained by fraud, will be set aside. *Id.*, 236, 237. We were entitled to suspend his grant by *caveat*, and prevent its issuing—his fraud prevented the exercise of the right, and we now ask to have it on proving the fraud. His fraud has converted the defendant into a trustee for us, and we have a right to consider his legal title obtained for our benefit. The entry and payment of the purchase money, gave complainant an equitable title, and he was entitled to have it perfected into a legal title by grant. The defendant has improperly obtained that himself, with notice of our right, and, therefore, in trust for us. *He* cannot object that we have not surveyed. If we were asking a grant from the State, she might, perhaps, deny it on that ground. But the State is satisfied: the survey was fairly made, and she has given us a grant. We are not, therefore, seeking a grant from the State, but the benefit of one which the defendant, as our trustee, has obtained. The defendant cannot cavil against the title of his *cestui que trust*. Nor the perpetrator of fraud be allowed to clothe himself with the defensive rights of the State, whose title he has improperly assumed.

Fraud will never be encouraged in that way. 2 Wash. Rep., 116, At all events, the Court will decree a cancellation of the defendant's grants, and leave the validity or invalidity of the complainant's *grant* to be determined between him and the State.

*In Reply.*—The rule with regard to sheriffs is founded on their interest, and extends as well to their ministerial as their judicial functions. It would seem, that an interested person should not act in either capacity. In the case in Wm. Bl. Rep., the sheriff did not act judicially. His judicial authority consists in holding County Courts: his ministerial office in *executing all writs and processes*, (Com. Dig. Tit., *Viscount*, C. 1) and embraces an *Extent*. In in- (158) quisitions, he does not act judicially; for a deputy

may preside in enquiries upon default, and the judicial officer cannot be deputed.

If, from *necessity*, the surveyor may survey for himself, the privilege should not be extended farther than the actual necessity requires. It could not be necessary that the complainant should survey for himself. He might have *compelled* the surveyor to do it for him, or had his remedy upon refusal; or he might have obtained another deputy.

Again: If a deputy may survey for himself, he should shew that both he and the chain-carriers have been duly qualified by taking the oaths prescribed. They are facts within the complainants own knowledge, and are necessary parts of his case, and ought to be stated in the bill; although third persons need not state them, because the acts of an officer, *de facto*, are valid as to them.

It is said, that the proceedings have been ratified by the proper officers, and therefore are good, upon the authority of 2 Bin. Rep., 105. That case does not decide that such ratification validates the survey; it only says, that it is clearly bad without it. And the Judge there complains of the inconvenience arising from such evidence of title; which is a warning to us to make no such precedent here. The ratification is of no force in this State. The Governor issues the grant as a matter of course, when the survey is returned, and the grantee takes it at his peril, as to the regularity of his previous proceedings. And if the Court sees that it has issued improvidently, they will not aid the complainant, but leave him where he is.

The complainant is not entitled to relief, by having the defendant's grant put out of the way, or by converting him into a trustee. If the first be done, the Court will aid in cheating the State, or the decree will be nugatory. If (159) the State has any means of revising the grants, the decree will do him no good; for they ought to be vacated. If they can be vacated on account of the surveys, then he has no title which this Court can uphold or aid.

Nor can Walker be converted into a trustee. If his grants be regular, Avery should place himself in the same situation to ask a conveyance from him, as to ask one from the State. But by the shewing in the bill, the grants of both parties are liable to the same objections, and both have been guilty of the same offence against the State. A complainant must come here with clean hands, and the Court will never, for

him, separate the foul from the fair part of his case, for the sake of giving him relief. Where parties are *in pari delicto*, Courts refuse to interfere, except in cases where *public policy* requires it. 1 Fonb. Eq., 25, 138; 2 Chan. Cas., 15; 1 Vern., 452; 2 Vern, 603; 1 Chan. Cas., 202; 6 T. R., 409; 13 Ves., 581; 4 East. Rep., 372; 1 Ves., 277, 206; 4 Ves., 811; 2 Vern., 156. Justice to the State requires that both parties should be stripped of their titles. Walker's grants ought not to be cancelled and Avery's be let to stand: nor ought Walker to be compelled to convey his title to Avery, to enable him the better to defend himself against claims of the State.

HALL, Judge, delivered the opinion of the Court, as follows:

This case comes on upon a motion to dismiss the bill. In support of that motion, the defendant's counsel allege that the lands were not the subject of entry at the time when the complainant made his entry—they were parts of the lands reserved to the Indians for their hunting ground, as is declared by the act of Assembly passed in 1783, ch. 2. And it is contended, that notwithstanding the treaty with the Cherokees, of 1791, by which their title became extinct, the lands did not thereby become the subject of entry, without some further Legislative act. We do not deem it necessary
(160) to decide the question at this time; because, admitting the entry to be good, there is another objection, which, being sustained, must have the effect to dismiss the bill.

The bill states that the surveys were made by the complainant himself, under an authority to do so from the surveyor for the county. It does not state, that he or the chain carriers were sworn.

An act of Assembly passed in 1777, ch. 1, directs the manner in which a surveyor shall be appointed, and prescribes the oaths that shall be taken, and directs that bond and security shall be given for the faithful discharge of his duties of office. By another act, passed in 1779, ch. 6, s. 5, surveyors are authorized to appoint deputies; but, before entering on the duties of office, they also must take an oath of office. The first mentioned act declares, that no surveys shall be made without chain carriers, who shall actually measure the land surveyed, and shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor, who is authorized to administer such oath.

There was, at that time, much vacant land in the State, and it was deemed expedient by the Legislature, to dispose of it to individuals. The entry takers, surveyors, and chain carriers were the persons on whom the trust devolved of parcelling it out, as the different acts direct. When an entry was made of land, and a warrant of survey issued, it was the duty of the surveyor to survey as much land as the warrant called for, and no more or less: nor has the law authorized or trusted any other person to do it.

If the complainant had qualified as a deputy surveyor, he could not be permitted to survey his own land: there would be no necessity for it. Such surveys may be made by the surveyor or other deputies. Whether the principal surveyor can survey land for himself, need not be decided in this case. The complainant, as a deputy surveyor, surveyed for himself, without being sworn, or having sworn chain car-
(161) riers. Upon his location thus made, we are called on to superadd the legal title which, it is charged, is in the defendant. The bill further states, that Walker was authorized by the surveyor to survey land for himself; but, that in fact, he never did survey them, but took the surveys from the complainant's field book; and that upon such surveys, he obtained his grants from the State. We are called upon to recognize that title, and compel the defendant to transfer it to the complainant—a title, however improperly obtained, which would complete the complainant's right to the land; though he has a few merits on his side, and a little equity to call for it, as the defendant had when he acquired it.

The complainant's surveys were not made as the law requires; and if they are to be countenanced, and it shall be said that every person may be his own surveyor, those strong guards which the law fixed against fraud and imposition, will be at once broken down. What security have we, that twice the quantity of land is not included in the complainant's surveys, that he entered and paid for? I cannot doubt in the case. The bill must be dismissed with costs.

# REPORTS OF CASES

ARGUED AND ADJUDGED

## IN DECEMBER, 1820.

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DAVIDSON and others *v.* DAVIDSON'S Executors.

*From Mecklenburg.*

IN EQUITY.

A. devises lands and slaves, and other personal property to M. L. D.; but if she "*dies without having heirs*, then, any in that case, the property bequeathed to her, shall be divided into four equal parts, between his brothers J. H. and S. and B's children:" *Held*, that the limitation over is too remote, and that the whole estate vests absolutely in M. L. D.

This was a bill filed for a legacy; and it stated that Thomas Davidson made his will and died in the year 1800, and that by his will, he bequeathed as follows, that is to say—"I give and bequeath to my daughter Mary Long Davidson, my negro woman Nanny, and all her children, together with all my lands and tenements, and the remaining half of my household furniture and personal estate: also, my will is, that she be allowed out of her own part, what my executors shall think a sufficient sum for clothing, schooling, and boarding with her mother, according to her income, or the interest of the money: *Likewise, my will is, that if the* (164) *said Mary Long Davidson dies without having heirs, then, and in that case, the property bequeathed to her shall be divided into four equal parts, between my brothers, James, John, and Samuel, and Hugh Bryson's children.*" It further stated, that Mary L. Davidson was the only child of her father, and an infant at the time of his death, and shortly thereafter, departed this life herself, at the tender age of four years, and without ever having had issue. The complainants were the remainder men to whom the estates were limited, after the death of M. L. Davidson, and brought this suit against the executors of the will of Thomas Davidson, for an account and payment of the legacy.

The defendants put in a general demurrer; and the cause

was transferred to this Court for a decision, and was argued here by Seawell, Mordecai and Ruffin for the complainants, and by Henderson and Gaston for the defendants.

Arguments in support of demurrer.—The limitation over is too remote, and is void. Words, which, applied to an estate of inheritance, create an estate-tail therein, give an absolute interest in personal property—*Wilkinson* v. *South*, 7 T. Rep. 557. The words here would make a fee-tail, if the estate were one of inheritance. A devise to A. for life, and after his death, to his *issue*, is an estate-tail, 1 Vent. 214,225. 2 Ld. Raym. 1440. 2 Lev. 58. So, a devise to A. and *if he die without issue*, remainder over, is an estate-tail, 1 Vent. 230. Cro. Jac. 448. 1 Pr. Wms. 226, 685. 1 Ves. 24. And a devise to A. and his heirs, and if he die without heirs, remainder to one who is heir to A., is an estate tail, *Morgan* v. *Griffith*, Cowp. 234. *Porter* v. *Bradley*, 3 T. Rep. 145. Chas. T. Talb. 1, 2. 2 Com. Rep. 82. 1 Pr. Wms. 23. 1Ld. Raym. 668. 3 Term Rep. 491. A devise to one, and if he die, not *having a son*, then to remain to the heirs of the testator, adjudged an estate-tail, Gilb. L. Dev 39. And Lord Hale, in the great case of *King* v. *Melling*, 1 Vent. 231, said (165) the same thing. The words in *Wylde* v. *Lewis*, 1 Atk. 432, were, after the devise to the wife, "and if it shall happen that she *shall have no son nor daughter by me, and for want of such issue*," then over: And Lord Hardwick says, there is no difference between that case and *King* v. *Melling*, in which the devise was, "if he die not *having a son*,"—for that, the expression "die *having no issue*," and "die *without issue*," mean the same thing. Id.434. Again, one devises land to W, and if he should depart this life *not having issue*, then his sons-in-laws should sell the land: W. had issue and died, and then the issue died without issue. It was resolved that the lands might be sold, though at the time of W's death he had issue; for whenever that issue failed, W. might be said to be dead without having issue, 1 Leon. 285. 1 Pr. Wms. 665. In all these cases, the word "*having*," could not tie up the devise over, to the death of the first taker. And the last case is very strong; the words being "*depart this life, not having issue*" It is directly in point, as the words here are "*die without having heirs*," and the limitation over being to collateral heirs, which confines the word "*heirs*," to *issue*. A distinction has, at times, been attempted

between such limitations of a term in a will, as if applied to inheritances would create and express estate-tail, and those from which an estate-tail would arise by implication only. But the attempt never succeeded, so as to become a rule: at all events, it is now entirely exploded. *Barford* v. *Lee*, 2 Freem. Rep. 210, 287. *Green* v. *Rod. Fitzg.* 68. *Love* v. *Windham*, 1 Mo. 51. 1 Fearn. 4th Ed. 363, 364, 365, 366, 367. 2 Fearn. 5th Ed. 230, 231. Butler's Fearn. 478, 466, note (*a.*) The case of *Bowden* v. *Galloway*, before Lord Northington, in 1764, 1 Term Rep. 595, was a bequest of personalty to G. for life, and if he had no heirs, then to his sister; and the limitation over was held void. In all the cases, whether of real or personal estate, the words "dying without heirs or issue," or "without having heirs or
(166) issue," necessarily operate to the enlargement of the previous estate for life, to which they are attached, 2 Bro. C. C. 588. None of the cases, which would seem at first view to countenance such a distinction, will be found, in fact, to do so upon minute examination. They all go upon something in the context of the will, indicating a clear intention of the testator, that the limitation over should be tied up to the death of the first taker. The leading case is *Forth* v. *Chapman*, 1 Pr. Wms. 662. This case turned on the words, "*leave* no issue;" though that observation is omitted in the report of it. But in *Beauclerk* v. *Dormer*, 2 Atk. 313. Lord Hardwicke says, that he was of counsel in *Forth* v. *Chapman*, and that Lord Macclesfield laid a good deal of weight upon the particular penning of the will, and the words, "*have* no issue of their respective bodies:" and subsequently in *Sheffield* v. *Orrery*, 3 Atk. 288, he says, *Forth* v. *Chapman* was *determined* upon those words. *Daintry* v. *Daintry* was decided on the same word, "*leaving;*" in which, Lord Kenyon says, "this is precisely the case of *Forth* v. *Chapman*," 6 T. Rep. 307. And so, in *Sabberton* v. *Sabberton*, before Lord Talbot, Cas. Temp. Talb. 245. *Pinbury* v. *Elkin*, 1 Pr. Wms. 563, was determined on the words, "*then after her decease.*" It is said, in the case of *Nichols* v. *Hooper*, 1 Pr. Wms. 198, that where a legacy is given on the first taker's dying without issue, that it is to be understood a dying without issue then living. But such a construction was unnecessary in that case, and the limitation was supported on other grounds. The true reason was, because the legacies in remainder were to be paid *within six months after the death*

*of the survivor* of the son and wife of the testator. The remark was made by counsel in *Saltern* v. *Saltern*, 2 Atk. 376, that in a bequest of a chattel interest to one generally, or for life, and if he die without issue, or without heirs of his body, remainder over, it should be construed to mean, a dy-
(167) ing with issue at the time of his death. Lord Hardwicke took notice of it, and replied, that he knew of no such rule; for in those cases where the Court has restrained the words to a dying without issue, at the time of the death of the first taker, there were other words or circumstances, which clearly shewed it to be the intention of the testator, so to confine them. When there is a devise of a lease for years to a man, and if he die without issue, remainder over, there is no doubt but the whole vests in the first taker. *Target* v. *Gaunt*, 1 Pr. Wms. 433, was a devise to A. for life and no longer, and after his death, to such of his issue as A. should *by will appotnt*, and in case A. should die without issue, then over. The limitation over was good, because such issue must be intended as A. could appoint the term to, that is to say, issue living at his death. *Keely* v. *Fowler* was determined upon the ground that, in the event of a dying without issue, the estate was to *return back to the Executors*, to be *by them* divided. It was, therefore, a *personal* trust in the Executors, Per *Buller, J.* in 1 T. Rep. 597. *Hockly* v. *Maubery*, 3 Bro. C. C. 82, and in *Doe* v. *Lyde*, 1 T. Rep. 593, were decided in favor of the limitations over, because, in the former, the estates were given to "R. and his issue, lawfully begotten, or to be begotten, *to be divided amongst them* as he thinks fit; and in the latter, the devise was to G. and after his death, to his wife for life; and after the death of the survivor of them, *to their children, share and share alike.*" Here the children could not take as heirs in succession, but must take, if at all, *distributively* as purchasers; and therefore no estates tail were created, and the limitations over were good: Moreover, in *Doe* v. *Lyde*, the remainder over was after life estates only, which excludes the idea of an indefinite failure of issue. The judgements in *Hughes* v. *Sayer*, 1 Pr. Wms. 534, and *Nichols* v *Skinner*, Proc. in Chan. 528, both went on the limitation over, being to the "*survivor.*" In *Wilkinson*
v. *South*, 7 T. Rep. 555 the words were the same as in
(168) *Pinbury* v. *Elking;* and in *Doe* v. *Jeffery*, 7 T. Rep. 589, the limitations over were for life only, and after a dying without *leaving* issue. There is no expression in

this will to control the general construction of dying without issue. Many of the cases already cited, prove that the word "*having*" will not have that effect, but will create an estate-tail. There are others still stronger—*Croke* v. *Devandes* 9 Ves. 197, has these words, "and if he *has* no such heirs;" then over; and the limitation over is held void. So, one directs her house and all her effects to be sold and laid out in the funds for B. during his life, and *if he have no heirs*, to go to his sister: Lord Hardwicke held the limitation over to the sister to be too remote. He says, that if I were to determine it to be good, I should violate the principal intention of the testatrix, which was, that B. *and his issue* should take before the sister:—I cannot imply a gift to the issue as purchasers; for the word "*heirs*," must mean heirs of the body, so as to make the estate transmissible to them by descent—that is the only way in which the issue can be preferred to the sister, as was certainly intended, *Boden* v. *Watson*, Amb. Rep. 398, 498. The case of *Attorney General* v. *Hird*, 1 Bro. C. C. 170, is very much like that now before the Court. The devise was of personalty to B. and the lawful heirs of his body, *if he should have any*; but if he should die without lawful heirs, then over; and the limitation over was held to be too remote. The distinction between the two cases is not easily drawn; for the word "*heirs*" here, certainly means, heirs of the body— and the words "if he should have any," were particularly relied on in *Attorney General* v. *Hird*, to shew that it was in the mind of the testatrix that he might never have any.

Arguments on the other side.—It is admitted that the word "*heirs*" means *issue* in this case, as the limitation over is to collaterals capable of taking as heirs of M. L. Davidson. *Webb* v. *Herring*, Cro. Jac., 415. The question, then, (169) is, whether the testator meant by these words, "dies *without having heirs*" (or issue) an indefinite failure of issue, or did he mean a dying without *leaving* issue at the death of Mary? The fundamental rule for the construction of all instruments, is to make them conform to the intention of the parties. In some the intention must be made apparent by terms specially appropriated for the purpose: in last wills, any word which show the meaning of the parties, will be sufficient.

Whenever words are susceptible of two significations, the one lawful, sensible and capable of being effected, the other

insensible, unlawful, or impossible, the Court presuming that every man aims at an object lawful and sensible, will give to his words the construction which goes to effect that object.

Without adverting to the word "*having*" at present, it is contended, that in this State, the limitation over, upon the death of M. L. D. *without issue*, is good, and means a dying without leaving issue living, at the time of her death; such is the *natural* signification. In construing those words, the Judges in England have held them to mean, in relation to real estates—an indefinite failure of issue; that arose from the statute *de donis*. The ulterior limitation was not thereby treated as illegal, but full effect was given to it. A particular set of heirs were let in under the statute, and the limitation over was supported as a remainder after the estate-tail. They, therefore, did not depart from the natural meaning of words, to give them an illegal signification, or to deprive them of all efficacy; but they construed them in the sense in which they were used by the testator, and permitted them to create the estate intended by him—that is, an estate-tail. *Jones* v. *Spaight*, 1 No. Carolina Law Repos., 554.

What is to prevent the operation of these words (170) according to their natural import, in this State? We can give to them no artificial meaning which will transfer an estate. We cannot give a remainder in real estate after an indefinite failure of the issue of the first taker. We must, then, take them in their natural sense, or must reject them as insensible. With us, therefore, they do not denote the channel through which the estate shall pass in a course of inheritance, but only refer to a *future event* or particular *contingency*, upon which the estate shall over.

The construction of these words was afterwards applied in England to personalty, without reflecting on the difference of the nature of the two estates. Personal estate was then of small value and little regard. Insomuch, that a gift of it for a day, was a gift forever: It could be limited over by deed, and the indulgence of doing so by will was extended with a very sparing hand. These words, therefore, which had gained a construction as to real estates, were held to have the same signification, when applied to personalty. But if they cannot, in reason, when applied to real estate in North Carolina, have this construction, much less can they in regard to personal estate. *Cessante ratione, cessat* LEX. Much more, *cessante ratione cessat*, CONSTRUCTIO VERBORUM.

But if the English cases are to govern, they are in favor of the ulterior limitation in this will. Undoubtedly a devise over, after a dying with issue, generally, is held to be too remote there. But as that construction was made by blindly following that given to the words when applied to inheritances, the Courts soon perceived the error and the inconvenience of it, and have seized any circumstance, however minute, to rescue a case from the authority of those early decisions. 2 Fearn., *187, *239; 1 T. R., 597, per Buller, quoting Wilmot. In *Nichols* v. *Hooper*, there was a devise of lands to M. for life, remainder to T. and his heirs—provided if T. should die without issue of his body, then £100 to A. to be paid within six months after the death of M. and A. Lord Harcourt decided that *die without issue* (171) should be taken according to common parlance, and held the legacies to be *personal provisions;* though Lord Hardwicke assigns a different reason for it in *Beauclerk* and *Dormer*. So there was a devise, in *Hockley* v. *Mawbry*, 3 Bro. C. C., 82, of real and personal estates to R. and his issue lawfully to be begotten, *to be divided among them as he thinks fit;* and if R. shall die *without issue*, the estate to be sold, and the money to be divided amongst my brother's and sister's children—but the sale not to take place in the life of R. or testator's mother. The words *to be divided* among them, are laid hold of by the Chancellor to shew that the son was not intended to take an estate-tail, because the estate was to go distributively: yet, it being leasehold, it could not have gone to the issue by virtue of an entail: and as to the words, "*as he thinks fit*," they are immaterial, for if he made no appointment, the issue would take. This case shews the avidity of the Court to escape from the rule. *Target* v. *Gaunt* differs from *Hockley* v. *Mawbry* in this: that there is no bequest to Henry's children, and they can take only by virtue of his appointment. The bequest is to *such* issue as he shall appoint, and for want of *issue* over. The bequest is not for want of *appointment*, over, which would make the appointment a personal act; but for the want of issue. The Chancellor supplies the word *such* issue, to help the intention. This is a very strong case; for if Henry had left issue, and made no appointment, Albinus would have taken, there being no estate given to the issue as purchasers, except as Henry's appointees. In *Pleydell* v. *Pleydell*, 1 Pr. Wms., 749, the bequest was of the interest of £400, to A. for life; then

to his first son until he should attain 21, at which time he should receive the principal; but if the eldest son should die before 21, then to the second son; and *if A. should die without issue*, to the testator's right heirs—the limitation over was held good; and Lord Macclesfield, who tried the cause,
(172) tells us, that he so held it because the natural meaning of the words to "die without issue," confirms the failure to the life of the person—though Lord Hardwicke, wiser than the other, says that he had a better reason which he did not give, that is, that "issue" meant "such issue," viz: *sons*. In *Attorney General* v. *Bailey*, 2 Bro. C. C., 553, the words "*without issue*" were confined to such issue as had been before provided for. On a devise of a term to J. for life, then to such person as he should marry, for her jointure, and after her death, to the heirs of the body of J., and the executors, administrators and assigns of such heirs, and for default of such issue of J. then to H.: the devise over was held good, because of the words "executors and assigns of such heirs"—yet the words were in themselves immaterial as to limiting the quantity of the estate, and, in fact, altogether inoperative, except that they afforded the Court a way of escaping from authorities which they were unwilling to attack. *Donne* v. *Merryfield*, 2 Fearn., *190. So, in the case of *Pinbury* v. *Elkin*, the words "then after her decease," were taken hold of, although they conveyed nothing more than had been before expressed; for the brother was not to have the £80 until the wife died That case was followed by that of *Wilkinson* v. *South*, in the King's Bench, in Lord Kenyon's time, which turned on the same words. And in *Sheppard* v. *Lessingham*, Ambl. Rep., 122, "dying without issue" is again construed, on account of the intention of the testator, to mean "without *having* issue." The devise in *Forth* v. *Chapman*, was of real and personal estate, to two, and if either should depart this life, and leave no issue of their respective bodies, then over: *Held* to create an estate-tail in the realty, and to be a good executory devise of the personalty. This case has always been acquiesced in, and it evinces the anxiety of the Courts to get rid of the absurd construction of the words "die without issue," when applied to
(173) personalty. Taken together with *Southby* v. *Stonehouse*, 2 Ves., 606, and *Sheffield* v. *Lord Orrery*, 3 Atk., 288, it proves the proposition advanced on the other side, that whatever words would give an estate-tail in realty will

carry the whole in personalty, is not correct to that extent.

If the Court, then, can find any word in this will which can act as an auxiliary, to support the natural meaning of the words "die without issue," however *minute* the assistance may be, they are bound by these authorities to tie up the time to the death of M. L Davidson. There are several circumstances that ought to have that effect.

The word "*having*" is chiefly relied on. The grammatical sense of the word, standing where it does, refers emphatically to the death of M. L. D. It may, without violence to expression, mean *having had* children; but it cannot extend prospectively to a future time. If Mary L, at her death, had had a child, which died, and the question was asked, did she die without *having* children? the answer would be, no, she had a child which died. But the sense of this word, either as a participle of the present or past time, answers our purpose equally well. There are two cases expressly in point, in which the words "without having married," are held to mean, without *having ever been* married, and the words "*without having children*," were construed, without having children born, or without leaving issue at the death, according to the context of the will. *Weekly* v. *Rugg*, 7 T. R., 322, is one of them. A. gives a leasehold to his daughter D, but if she dies without *having* children, then over, and held good. The words "child or children," make no difference in the case; for they or the word "son," would be construed *issue*, to avoid the absurdity of excluding *grandchildren*. Gilb. L. Dev., 39; 1 Atk., 432. In our case, this word "having" may be allowed to retain its grammatical sense. In *Weekly* v. *Rugg*, it was conssrued to mean "having had," in order to (174) let in a grandchild; but as, in our case, the word is "heirs," meaning "issue," there is no necessity for that construction, because the word will embrace any children and grandchildren which M. L. D. might leave at her death. According to the construction given to this word "having," in the case cited, it is more restrictive than "*leaving;*" for by the latter, the property is tied up to the death of the first taker, whereas, by the former, it may be set free in the life of the first taker, by the birth of a child. This is what is meant by Lord Kenyon, when he says there is a great difference between "leaving" and "having." He did not mean that "having" was more remote; for the devise over is not adjudged void in its creation upon the ground of

remoteness, but to have failed by reason of the contingency, that is, by the daughter's having a child. The other case is *Bell* v. *Phyn*, 7 Ves., jr., 454–458, in which B. bequeathed the residue of his personal estate to his three children, G, J. and C, but if any of his children died without being married and having children, the share of such child should be divided between the survivors. J. married and had one child; and the question was, whether J thereby took a vested interest in one-third part of the residue? This depended upon the construction of the words "having children." The Master of the Rolls takes notice, that nothing in any event is given to grandchildren, but every thing in the first instance to the three children: but, says he, whether to remain with them absolutely or to go over, is to depend upon a contingency, which is that of "having children:" *either having them born*, or *leaving them at his death*. And after assigning his reasons for prefering, in that case, the former construction, he decides, that in the event which had happened, J's share was vested This case is peculiarly applicable; because the reason given for vesting the legacy upon the birth of a child, is,

(175) that it would be unreasonable, if the testator's children should have children, that it should be out of the power of the parent to touch the capital for the purposes of educating or advancing his children, because the children might possibly die before the parent; though the only consequence of surviving the parent would be, not that the children would take any thing, but that the parent might dispose of the whole as he thought fit. So here. Why tie up the estate to the death of M. L. D. to see if any issue she may have shall survive her? For her issue, *as such*, cannot take under the limitation, according to our Law. If, however, it is to be taken in the present tense, then it refers to the time of her death, according to Lord Hardwicke's comment of "*leaving*," as a participle of the present tense, in *Read* v. *Snell*, 2 Atk., 647. The dictum of Lord Hale, quoted on the other side, was not uttered to test the efficacy of the word "having," but to shew that "son" was in that case *nomen collectevium*. The case of *Wild* v. *Lewis*, 2 Atk., 432, did not turn on the word "have." It is a devise to Elizabeth my wife, and if she shall have no son or daughter by me, for want of such issue to return to the plaintiff, if he shall then be living, he paying to A. and B. £150, within a year after the death of Elizabeth. The devise over to the

brother, if then living, and the bequest of the £150, as in *Nichols* v. *Hooper*, shew that the testator meant to confine the contingency to the death of the wife. The case, therefore, is to be supported upon the principle of making the particular yield to the general intention of the testator; for without such construction a grandchild could not have taken. The case from 1 *Leon.*, 285, is reported in *Cro. Eliz.*, 26, and in *Dyer*, 219, *a. in the note*, and the word "having" is not used in them at all. It is a devise "to William, in tail, and if he *depart without issue*, that his *sons-in-law* should sell." One of the sons-in-law dies, William dies, leaving issue a
(176) daughter, who dies, and the question is, whether the *surviving son-in-law* alone could sell.

Again: The words "then and in that case," are used in this will. In *Pinbury* v. *Elkin*, the Chancellor relied on "*then* after;" and in *Wilkinson* v. *South*, Lord Kenyon calls "then" an adverb of time, and says there is a case in the Books to shew that *then* and *when* are adverbs of time. But if it would not do when standing alone, yet coupled with the other words "in that case," it is certainly an adverb of time. The estate is to go over "then," that is, upon the death of the daughter, "in case" she dies without having a child. It is easy to see the operation of the testator's mind, while writing this clause. After writing the word "then," the idea occurred to him that that would mean *at* his daughter's *death;* he therefore qualifies it by adding "in that case;" as much as to say, the estate is not to go over at all events at my daughter's death, but only in case she then has no child.

Whenever it can be perceived, that the testator *intended a personal* benefit to the ulterior devisees, the failure of issue will be confined to the death of the first taker. In *Beauclerk* v. *Dormer*, Lord Hardwicke says, "a strong argument might be drawn from the £5000, given to Lady D. B. if it was merely personal to her, and not to arise unless she survived Miss Dormer; but the argument is defeated by its being vested and transmissible." But the question is not, whether, in fact, the legacy is merely personal, but whether the testator intended a personal kindness to the legatee. In *Pinbury* v. *Elkin*, although one ground of the opinion was, that the £100 was intended as a personal benefit, yet it was decreed to the executor. In *Donne* v. *Merrifield*, the words "executors, administrators and assigns," though immaterial, were considered as furnishing evidence of intention. Wilmot says, in

*Keely* v. *Fowler*, 2 Fearn. 246, we are not to consider of legal consequences of legal representations, but what the (177) testator meant by giving to the executor. And *Smith* v. *Fisher*, 2 Rep. Chan. 187, lays down the rule, that where the bequest over, is in the direction to *divide* the estate, the legacy is personal.

Part of the estate given here, is specific personal property, that is to say, slaves. From its nature, it could not be intended that it should go over only upon an indefinite failure of the issue of M. L. D. This argument is said, in a case in 2 Hayw. Reports, to have the merit of novelty. It seems not to be entitled to that; for it had its weight in *Keely* v. *Fowler*, and the counsel in the *Attorney-General* v. *Hird*, relies upon it. It does seem strange, to suppose that a testator can contemplate negroes to go over two or three centuries hence.

*Reply.*—It has been contended, that the limitation over is, 1st, on the event of Mary not *leaving* a child at her death—or 2dly, *never having had* any child. Neither ground is tenable.

Whenever the limitation over, is after a dying without issue, unless there be some distinct expression to tie up the meaning of these words, or clear circumstances to demonstate, that they were used in a more restricted sense, the limitation over is held to be after an indefinite failure of issue, and to be too remote as an executory devise. *Beauclerk* v. *Dormer*, 2 Atk., 308; *Saltern* v. *Saltern*. *Id.*, 376; *Biggs* v. *Bensley*, 1 Bro. C. C., 189; *Chandless* v. *Price*, 3 Ves. jr., 99, 102: *Butterfield* v. *Butterfield*, 1 Ves. jr, 133-154. There are no words here which can legally have this effect. When words have obtained, by repeated adjudications, a defined meaning, it becomes a rule of property to assign such meaning to them, as Lord Eldon, Chief-Justice Parsons, and Chancellor Kent have all said. 9 Ves., 203; 8 Mass. Rep, 39; 16 Johns., 400.

The words relied on are, "then and in that case." (178) They are insufficient. "Then" is time, it is true, but *what* time? "In that case," tells us, not at her decease, but only, when this case shall happen—*What* case? is a question which recurs. Mere words determine nothing. In *Biggs* v. *Bensley*, the words were, "*in case* of the death of F. H. without issue, *then*" over—and were held not to vary

the rule. So in these other cases these words were used, viz.:

In *Green* v. *Rod*, "*in case* my sister dies without issue, *then*," etc.

In *Milword* v. *Milword*, 2 Atk., 309, "*in case* either die without issue, his part to go," etc.

In *Beauclerk* v. *Dormer*, "*if* Miss Dormer die without issue, *then* to Lord Beauclerk."

In *Cruger* v. *Heyword*, 2 Dess. Rep., 95, bequest of slaves to B., "but *in case* he die without issue, *then* to D. and his heirs forever."

In *Royall* v. *Eppes*, 2 Mun. Rep., 490, it is said, "the words *then and in that case*, do not justify the adoption of the restrictive sense of *dying without issue*."

Nor will the words "without HAVING heirs," operate further. The sense of these has been fully ascertained and precisely fixed by repeated decisions. Gilbert's Dev., 33—Sunday's case, 9 Co., 127; *King* v. *Melling*, 1 Vent., 227; 1 Atk., 423 In 1 Leon., 225, there is a devise to a son, and if he die, not *having* issue, the land is to be sold, and held to mean an indefinite failure of issue. So Lord Hardwicke expressly says, that "having no issue" has always been considered in the same light as "for want of issue." And the case, 6 Taunt. Rep, 263, turns directly on the words "having no issue," which are declared not to be restrictive. *Attorney-General* v. *Hird* is particularly strong for us, because the words are, "if he should *have any*," thus not only using the word *have*, but making it more emphatical by the other word *any*. And the case of *Crook* v. *De Vandes*, is decisive of the ques-

(179) tion. That is a bequest to A. and the heirs of his body, and if he *has* no such heirs, over. Lord Eldon held the limitation over to be too remote, and contrasted the meaning of *have* and *leave*. by saying, that if the will had been "if he *leaves* no issue," the limitation over would have been good. If these cases needed, or could receive, confirmation, they obtain it by observing that the limitations in many trying cases, have been supported by the peculiar force of the words "leave" and "leaving." Such are the cases of *Sheffield* v. *Orrery*, *Daintry* v. *Daintry*, *Reed* v. *Scull*, and *Weekly* v. *Rugg*. In this last case, Lord Kenyon remarks, that "leaving" is essentially different from "having"; and in 2 Bos. & Pul., 327, Lord Eldon draws the distinction between that and Clatch's case—the one being "*leaving*," and the other "*having*."

The cases which turn upon the words "to be divided," and have been cited by the other side, are not law. Keely and Fowler has been explained by Mr. Fearne, and denied; and it has been justly reprobated by Lord Thurlow. *Smith* v. *Fisher*, as reported in 2 Rep in Chan., is contrary to a fuller and better report of it in 2 Vern. 38, 59, which agrees with Mr. Fearne's opinion. 2 Fearn. 372, 373, (261.*) And this position is expressly opposed to the cases of *Earl of Stafford* v. *Buckley*, 2 Ves. sen. 170, 181, 182, and *Green* v. *Rod.*

The cases of *Weekly* v. *Rugg*, and *Bell* v. *Phynn*, are both decided with the view of avoiding the inconvenience of giving a strict meaning to the words "*child* or *children*." Those words, and not that of "*having*," determined the questions. To construe them as authorities for making "die without *issue*," or "without having *issue*," mean "without *having ever had* a child," would be to prostrate the whole edifice, which has been building for ages. It would reverse all the cases enumerated, and particularly, *Attorney General* v. *Hird*, *Boden* v. *Watson*, and *Crook* v. *De Vandes*. It having been repeatedly decided, that to die *without having issue* is the same as to die *without issue*, all the cases upon these last words, (180) in which they have been pronounced too general, would at once be reversed. In fine, it would stamp with folly all the antecedent discussions and decisions in which the great enquiry has been, for words to tie up the contingency to the moment of death; but now it is found, that all might be sustained by a slight interpolation—by turning the present into the past tense.

The decision of this question is immensely important. *Jones* v. *Spaight* has settled, that the same interpretation must prevail, whether the estate be real or personal. A decision in favor of this limitation must remove all land-marks; certainty and stability in the laws of property, are infinitely important. We had supposed that such certainty was effected by the previous cases in this State; *Sutten* v. *Wood*, Conf. Rep. 202, *Jeffries* v. *Hunt*, 2 Hayw. 130, *Mathews* v. *Daniel*, Id. 346, *Bryant* v. *Deberry*, Id. 356, and the case of *Bryson* v. *Davidson*, *on this very will*, in this Court, at December Term, 1806.

The nature of the property will not alter the construction here. It is true, that negroes form a part of it; but that cannot make a difference. The rules are laid down for real and for personal property, and are adapted to their different

natures: but there is none founded on a distinction between different species of personal property. At all events, the devise here is of lands and of half his personal estate, generally, as well as of specific slaves; and of the slaves, it is to be remarked, that their children as well as the parents themselves, are included in the limitation over:—so that no argument can be drawn from this part of the case.

TAYLOR, Chief-Justice.—The general principle on which this case must be decided, is, that where such words are used in a will, in relation to personal property, as would have created an estate-tail in real property, they give the absolute property in personalty, and the limitations over are (181) void. The exception to the rule is, that if it appear from any clause or circumstance in the will, that the testator intended to give it over, only in case the first taker had no issue, living at the time of his death, then the subsequent limitation, will be good as an executory devise. It was impossible for M. L. Davidson to die without heirs, while the ulterior legatees were alive; the word heirs must, therefore, be construed heirs of the body, and would, if applied to real estate, before the act of 1784, have constituted an estate-tail.

It is not material to enquire, whether the words of the will would have created an express estate-tail, or an estate-tail by implication; because, in either case, a limitation over, after an indefinite failure of issue, is too remote. If the limitation depend alone, upon the import of the words, "dying without issue:" the question still recurs, are there any circumstances or expressions in the will, from which it can be justly inferred, that the intention was to confine the signification of the words, to a dying without issue "then living?"

It has been conceded by the Complainants' counsel, that a limitation over, after a general dying without issue, is too remote; but it is argued, that the words, "dies without *having* heirs," restrict it to the death of M. L. Davidson; that they shew the intention of the testator to have been so; and that this ought always to be effectuated, where the Court is not compelled by the law, to give a different construction to the words.

The foundation of this argument must be laid, by proving that the words used in this will, have a different signification

from the words "if he dies without heirs;" for, if the two sets of expressions mean the same thing, the Court is not at liberty to depart from the established judicial sense of words, whatever may be the intention. *Chandless* v. *Price*, 3 Ves. 102.

(182) It is probable, though I am aware that there are some very respectable opinions to the contrary, that a limitation over, on the event of dying without issue, is always intended to apply to a failure of issue, at the period of the death of the first taker; yet the authorities, uniformly, construe it an indefinite failure, unless the words are controlled by the intention appearing from other parts of the will.

This construction is highly technical and refined, and seems generally considered to be derived from the statute *de donis*, which recites, "and whereas if such feoffees had no issue, and even if there had been any issue, which had afterwards died, the land ought, by the express form of the gift, to revert to the donor or his heirs."

If the question were new in this State, I will hazard the conjecture, that this Court would construe these words in their natural sense, and reject the artificial one; but this cannot *now* be done, without overturning a long train of authorities, which have been repeatedly confirmed, and acted upon, by all the tribunals of this country; and according to which, controversies have been adjudged, from the first settlement of the State. We could not change the legal operation of these words, without removing land-marks, and throwing a very large portion of the property of the citizens, into litigation and insecurity.

Between the words, the settled construction of which has thus become a part of the law of the land, and those employed in the will before us, I am unable to perceive a difference; and, I collect from the authorities, that they always receive the same construction, whenever the question is, as to the remoteness of the limitation.

In *Boden* v. *Watson*, Ambl., 398, 478, there was a bequest of personal estate to one for life, and if he *has* no heirs, over. The Chancellor held it to be the same as if given to him for life, and to the heirs of his body, and if no such heirs, (183) then over; that the failure of heirs was not confined to a particular time, but was general. Upon this case, it need not be remarked, that the words would seem, to a person who receives their meaning from common acceptation, to restrain the failure of heirs to the death of the devi-

see; and that if "having" has any peculiar force from being a participle of the present tense, "has" is at least of as much efficacy, from being a verb of the present tense.

In *Crook* v. *De Vandes*, 9 Ves., 202, there was a devise and bequest to A. for life, and the heirs of his body, with a limitation over, *if he has no such heirs*. It was held to be an estate-tail in the real, and an absolute interest in the personal estate, the limitation over being void. Why could not the word "has" have restrained the failure of heirs to the death of A. in that case? Because it imported the same thing with a general dying without heirs. The word "having" in this will, can signify neither more nor less.

In *Tate* v. *Tally*, 3 Call's Rep., 354–361, a devise was made of land to I. T. one of the testator's sons, with a proviso that if the said I. T. should die, *not having* any lawful heir of his body, then the said land should go to another son. This was held to be an estate-tail in I. T. The equivalent import of the words is further shewn in *King* v. *Mellish*, 1 Vent., 231, and *Wylde* v. *Lewis*, 1 Atkyns, 433.

It is further argued for the complainants, that the words "then and in that case," shew the intention to be to confine the having no heirs, to the period of the death of M. L. Davidson.

The word "then" was relied upon in *Beauclerk* v. *Dormer*, 2 Atkyns, 311, but the Chancellor laid no stress on it, holding that, though in its grammatical sense, it was an adverb of time, yet in the limitation of estates, it is a word of reference, and relates to the determination of the first limitation.

In *Biggs* v. *Bensley*, 2 Bro. Ch. R., 187, the words (184) were, "in case of the death of F. H. without issue," and it was argued that the deat of F. H. was the circumstance to regulate the question: it was to be decided then: if the ulterior legatee took *then*, he took absolutely; if he did not take *then*, he never took. But it was held, in conformity with the case of *Beauclerk* v. *Dormer*, that the word *then* could not, and never did make the difference: that it was merely a word of relation, and not an adverb of time. In *Royall* v. *Eppes*, 2 Mun., 479, the words of the will were, "it is my will and desire, that in case my son should die without heir of his body, lawfully begotten, *that then and in that case*, I give to my wife, Lucy," &c. These expressions were relied on by the consel for the ulterior legatee, for the same purpose as in the cases before quoted. But the Court, in giving the opinion, say, "that while, even in relation to

personal estate, as to which a more liberal rule of construction has prevailed, the Court does not see that either the terms, *then and in that case*, or the word *heir*, used in the singular number, would justify them in adopting the restrictive construction, under the decisions on this subject, either in this country or in England," &c. They then proceed, and do adopt, the restrictive construction, from another, and a stronger, circumstance in the will. This point, then, seems to be completely settled by authority.

That numerous class of cases has been referred to, which shews what slight circumstances have been laid hold of, to tie up the generalty of the expression, "dying without issue," and to confine them to dying without issue, living at the time of the person's decease.

In *Target* v. *Gaunt*, 1 P. Wms., 432, a term was devised to A. for life, remainder to such of his issue as he shall appoint, and if A. die without issue, remainder to B. It was held to be a good limitation to B, because the testator must have intended such of A's issue as he might appoint the term to, and that must be intended *issue then living*

(185) This case contains a pretty clear explanation of what was meant by "*dying without issue*," for it could not be indefinite, if A. was to make the appointment. Indeed, in every one of these cases, which it would be an unprofitable toil to re-state, the legal meaning of the words was narrowed by expressions or circumstances that raised a fair inference of restrictive intention, or, as it has been expressed, the construction was varied by circumstances arising on fair demonstration. There do not appear to me to be any such in this will, that will justify the Court in wandering from the settled construction; and I therefore think the bill should be dismissed with costs.

HALL, Judge.—By the statute *de donis* it is declared, that the will of the donor of lands and tenements, shall be observed; and the tenements given to a man and the heirs of his body, shall go, at all events, to the issue, if there be any; or, if there be none, shall revert to the donor; or the same may be limited over to another person, by way of remainder. If land were thus given to a man, and, "if he die without issue," remainder over to another, this remainder need not vest in possession at the time of the death of the donee in tail: It did not depend upon the contingency of his having

or not having issue living at the time of his death; but the remainder might thus vest at any future period, when the issue, if the donee left any surviving him, might become extinct. 2 Bl. Com., 113. Thus it vests in possession *whenever* the issue shall fail, and, as there can be no specific time fixed for that event, we call the period indefinite, and the remainder limited to take effect upon such an estate, we call a remainder to vest in possession after an indefinite failure of the issue in tail. The same rule of construction prevailed when the lands were limited over after a dying without "leaving issue," or "having issue," or "if he shall die and has no issue," or when any similar expression was used. They were all construed to mean an indefinite failure of issue, in (186) order that the "will of the donor might be observed."

Without the same reason, the same rule of construction was adopted in regard to personal property, (which was not within the purview of the statute,) with some few exceptions. The construction, as applied to the two kinds of estates, was followed by very different consequences. The limitation over of lands was lawful, and held to be good—but the Courts did not decide that limitations after an indefinite failure of issue, were lawful limitations of personal property. On the contrary, the Courts holding a limitation of personal property after a "dying without issue," to mean, after an indefinite failure of issue, adjudged it, as such, to be unlawful, because it tended to a perpetuity; and they would not, therefore, allow such a limitation to take effect, but made the whole vest absolutely in the first taker.—*Leventhrop* v. *Ashby*. 10 Rep., 87.

There can be no doubt but the construction is contrary to the vulgar and grammatical sense of the expressions; but it has become a fixed rule of property. It is a legal and technical construction, which it is too late to depart from.

It is true, that in limitations of personals, the Court will lay hold of any clause in a will, which affords demonstration that the testator intended to tie up the contingency, to the time of the death of the first legatee. But such words as those before adverted to, that is to say, "dying without issue," and the others, will not, *per se*, have that effect. The words, "dying without leaving issue," in limitations of personals, are an exception from the general rule, from the strong import of "*leaving*." 1 P. Wms., 667; 3 Atk., 288; 2 Ves., 610, 180, 125. It has been argued, that the word "*having*" is, (like

"leaving,") a participle of the present tense, and means and marks the same period of time. It is true, that it does, in its (187) grammatical and vulgar sense. So does the expression, "if he dies and has no issue"—the word "*has*" is in the present tense, and, grammatically speaking, would tie up the contingency to the time of the death—yet the legal and technical meaning is otherwise. Amb. Rep., 398, 478. The same may be said of the words "dying without issue." In their vulgar and grammatical sense, they mean the same as "leaving no issue;" but their technical sense is very different. 2 Atk., 308; Duke of Norfolk's case, 3 Ch. Ca. So that, if we were to give a vulgar and grammatical construction to the word "having," in this case, and to the other expressions which mean the same thing, the technical and legal rule of construction, which has so long prevailed, would be abolished. However much it is to be regretted, that such is the rule, I think we cannot now alter it; and that we must decree for the Defendants. It matters not, whether the property be viewed, in this case, as real or personal. If real, the act of 1784 converts into a fee-simple in the first devisee: If personal, the limitation over is too remote, and the same consequence follows, that is, the first taker has the whole.

HENDERSON, Judge.—I cannot better express my opinion, than by using the words of a celebrated English Judge: "The construction outrages grammar, and what is worse, it outrages common sense; it is a bitter pill, but we must swallow it because others have done the same"; we are bound to follow, and not to lead. The judicial construction put upon the words is too uniform, and of too long continuance now to be altered. It would unsettle too much property, and open the door for a flood of litigation. I am therefore bound to say, that the demurrer be sustained, and the bill dismissed with costs.

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(188) THE STATE *v.* ROBINSON.

*From Iredell.*

There cannot be an appeal to the Supreme Court from the judgment of the Superior Court, *granting a new trial* for matter of law:

Nor from a judgment of *respondeas ouster* given on demurrer to a plea in abatement:

Nor from a decree *disallowing a plea* to a petition for distribution and ordering the defendant to answer: because these are not *final* judgments, sentences, or decrees.

THE STATE *v.* ROBINSON.

This was an indictment for perjury, which charged that the prisoner was *sworn* in due form of law, before A. B., a justice of the peace, *upon the Holy Gospels of Almighty God.* The evidence upon the trial was, that the prisoner was not sworn on the Gospel, but that he said he was scrupulous of taking a book-oath, and prayed the benefit of the act of 1777, ch. 4, and therefore that he was sworn with uplifted hand, according to the provisions of the second section of that act. The jury found him guilty: and a rule for a new trial was granted, upon the ground that the indictment was not supported in that particular by the proof; which, upon argument, was made absolute. Mr. Solicitor Wilson, being dissatisfied therewith, appealed to this Court.

*Henderson*, for the prisoner, submitted whether this Court would entertain the appeal; because he conceived that the order for a new trial is not the *final* judgment or sentence meant in the act of 1818, ch. 1.

He was proceeding to make some observations upon the point of law stated in the record: but he was stopped by TAYLOR, Chief-Justice, who said that the appeal was certainly premature; and that the case of *Pierce & Robson* v. *Sneed* was decided upon the very point in this Court at June Term, 1819.

BY THE WHOLE COURT.—Let the appeal be dis-
(189) missed, and the cause remanded.

☞ There came on two other cases at this Term, which involved a similar point, and were disposed of in like manner.

The first was that of *The President and Directors of the State Bank of North Carolina* v. *Raiford and others:* which was debt in *Wake* Superior Court of Law. The defendants all resided in *Cumberland*, and there the process was served. For this cause they pleaded in *abatement.* The plaintiffs replied that they could sue in any Court, and set forth the charter of the bank; and the defendants demurred: upon argument, the demurrer was overruled and judgment of *respondeas ouster* given; and the defendants appealed to this Court. Here, the appeal was dismissed, because the judgment from which it was taken was not final; and the cause was sent back for further proceedings in the Court below.

The other case was that of *Wilson* v. *McDowell*, from *Burke*. It was a petition against the defendant, as an administrator of the estate of an intestate, for a distributive share: there was a plea in bar, that the defendant held the estate, of which a share was sought, in a different right, and that it belonged to the defendant and others, in their own right, and never, in fact, belonged to the intestate; and the plea set forth the particulars of the title. Upon argument of the plea, it was disallowed, and the defendant ordered to answer. From that he appealed to this Court: and here, his appeal was dismissed for the reasons assigned in the foregoing cases.

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(190) AINSWORTH *v.* GREENLEE.

*From Burke.*

**The hand-writing of a magistrate to his official acts need not be proved by himself, though within the process of the Court; but may be proved by any person acquainted with it.**

This was an action on the case for malicious prosecution, instituted by the defendant against the plantiff, who had been arrested on a warrant, carried before a justice of the peace, and by him duly tried and acquitted. To prove these facts upon the trial, the plaintiff offered the judgment of the magistrate, which he verified by the testimony of witnesses proving the hand-writing of the justice. On the part of the defendant, it was objected that the magistrate himself, who lived in the State, ought to be called. The evidence was, however, received, and a verdict rendered on it for the plaintiff, subject to the opinion of the Court upon the competency of that evidence. The Court afterwards decided upon the point reserved, that the evidence was inadmissible, and directed a nonsuit to be entered. From that judgment, the plaintiff appealed to this Court.

The case was submitted here; and

The opinion of the Court was delivered by TAYLOR, Chief-Justice:

To prove the acquittal of the plaintiff from the charge exhibited against him, the judgment of justice was produced, and proved by calling witnesses acquainted with his hand-writing. It is supposed, that by the admission of such evidence, the rule of law is infringed, which requires the best

evidence to be given of which the nature of the thing is capable; and that the justice himself, who was within the the reach of the Court's process, could better prove his own hand-writing than any other person. But this is an (191) incorrect view of the subject: for although the best evidence is to be given which the nature of the case admits, yet the rule does not require the strongest possible assurance of a fact. A deed attested by several witnesses would be more fully proved by calling upon all of them: yet it is sufficient to prove the execution by one; or, if none of them can be produced, proof of the signature of one of them will be sufficient. Such proof is not inferior in its *kind* to any that can be produced. Nor will the withholding of additional proof of the same kind warrant the inference, that such proof would be inconsistent with that already produced. Whether a signature is proved by the person who made it, or by one acquainted with his hand-writing, the kind of proof is exactly the same. They are both primary—since the knowledge of both is acquired by the same means; although it may be, that the evidence of the writer, is in degree stronger than the other. This principle is fully illustrated in Gibert's Law of Evidence, 5, and in Phillip's Treatise, 170, and its application to this case shews that the evidence was regularly admitted. Consequently, the nonsuit must be set aside, and judgment entered for the plaintiff.

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(192) SCROTER *v.* HARRINGTON.

*From Anson.*

In actions on penal statutes, it is necessary in the declaration to name the statute, or recite its provisions, or refer to it in some manner, as by the general terms "contrary to the statute in such case made and provided," so as to give the party notice of the law, with the violation of which he is charged.

*Held therefore*, that a warrant against H. to answer S. "in a plea of debt of £5, for obstructing and turning the public road leading, &c. from, &c. to, &c. being one month," is insufficient.

*Held further*, that this is a defect in *substance*, and is not cured by verdict, nor to be overlooked in proceedings before a justice of the peace, in which mere matters of form are not regarded.

This was a warrant returnable originally before a justice of the peace against Harrington, to answer the Plaintiff Scroter, "*in a plea of debt of five ponnds, for turning and ob-*

*structing the public road leading from Haley's Ferry to Sneedsborough, from Little Creek to Jones's Creek, from the 23rd day of April last past, until the 23rd day of May following—being one month.*" upon this warrant, judgement was given for the Plaintiff, for the five pounds and costs, by the justice of the peace; and upon successive appeals by the Defendant to the County Court and Superior Court, upon the plea of *nil debt*, verdicts were given for the Plaintiff, and similar judgements rendered in those Courts. The point made in the Superior Court, as stated in the record, was, that the Plaintiff could not maintain the suit in his own name only, under the act of 1784, ch. 14; because the fine belonged to the County, under the 17th section of the act, as was contended. This Court, however, did not consider that question at all, but without argument, decided for the Defendant upon the insufficiency of the warrant.

(193) Judge HENDERSON delivered the opinion of the Court:

That the Defendant may be informed of the nature of the charge against him, the law requires that the *facts* constituting it should be stated with precision; and, in cases where it is practicable, the *law* also, against which it is said he has offended. In cases of penal statutes, which are written laws, and therefore may be referred to with ease and certainty, it is required that they should, in the charge, be stated or referred to—anciently, by naming the statute by its title, or reciting its provisions: in modern times, by referring generally to it, in the following or similar terms—"*contrary to the statute in such case made and provided.*" The Common Law, being unwritten and traditionary, such reference to its provisions were impracticable, and therefore dispensed with. They are not made to apprise the Court of the particular law, or to inform the Judge what the law is: he is bound to take notice of all public laws, as well statute as common. The only case, in which it has been said that this rule might be departed from in actions on penal statutes, is that of *Coundell* v. *John*, 2 Salk. 505. The same case is reported in Fortescue, and in Holt's Reports, and was decided by Holt. I confess that the opinion of the Chief Justice, as stated in this latter book, is to me unintelligible: it looks both ways. But if the Reports stood free from all objections on the ground of inaccuracy, it is but a solitary case, and is contrary to principle and all the decisions before and since, and

must be disregarded. A long string of these cases might be cited; but I will only refer to one, in *East*, 2 East. 333. That case is much stronger than this; for there the conclusion is, "*whereby and by force of the statute in that case made and provided, an action hath accrued,*" &c. But, it not being stated that the Defendant *did the act contrary to the statute*, it (194) was held insufficient, and the judgment of the Common Pleas reversed. Whether that was a misapplication of the principle, is not now the question—the principle was there acted on, and professed to be applied. I think therefore, it follows very clearly, that as this is an offense against a statute, and that statute is not recited nor referred to in the pleadings, the judgement must be reversed. These proceedings, it is true, originated before a justice of the peace, and as to matters of form, are not to be critically scrutinized; yet matters of substance ought not, and cannot be overlooked. This defect is of this latter character, and therefore the judgement must be reversed, and judgement entered for the Appellant.

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## AUSTIN *v.* RODMAN.

*From Halifax.*

The drawer of a bill of exchange is entitled to notice of its dishonor, though the drawee be not indebted to him, either when the bill was drawn or fell due—provided, the drawer had reasonable ground to believe that it would be honored: And a written authority from the drawee to the drawer for the latter to draw is a sufficient ground.

If the bill be payable *after sight*, it must be presented within reasonable time *for acceptance*, and immediate notice of non-acceptance given to the drawer. It is not sufficient to give notice of non-acceptance and non-payment together, after the day of payment has passed.

If, in such case, the drawer be discharged, by the *laches* of the holder, from his liability on the bill itself, he will not be liable on a count for money had and received.

This is the same case which has been before in this Court, and now comes here by appeal of the Defendant. It was an action of assumpsit, and the declaration contained a special count on the bill mentioned hereafter, and also a count for money had and received. By the opinion of the Court below, the plaintiff had a verdict for the principal money (195) and six per cent. interest, and judgment accordingly. The case was argued here by Mordecai and Seawell for the Defendant, and by Gaston for the Plaintiff; and the

judgment below was reversed. The facts of the case, and also the points made at the bar, are so fully stated by the Chief Justice, who delivered the opinion of the Court, that it is unnecessary for the Reporter to do more than to give his words.

He said, the only question to be decided in this case is, whether the Plaintiff be entitled to recover on the count for money had and received—the count upon the non-acceptance of the bill having been abandoned, because there is nothing in the case tending to show notice of such non-acceptance.

The material facts are, that on the 11th and 20th April, 1815, E. Riggs, the drawee of the bill, wrote two letters to Rodman, the drawer, informing him that he had chartered the *Aurora* to go to Washington, in this State, for a cargo of naval stores, and directing Rodman to draw on him at Georgetown. The vessel arrived and began to load on 15th May, and completed her loading on the 9th June; but as part of her cargo was to be taken in at Occacock, she did not finally depart from our waters until 23d June. On the 13th of May, two days before the ship began to load, Rodman drew this bill on Riggs, at Georgetown, for one thousand dollars, payable thirty days after sight, in favor of the Plaintiff or order. There is a memorandum on the bill of its being noted on 27th of May; but the only protest is that for non-payment, which was made on 30th June; and on the same day, the Notary put a letter into the Post-Office at Georgetown, giving Rodman notice of the non-payment and protest. From these facts, we shall be able to ascertain whether there has been any laches on the part of the holder of the bill; for it is a very clear position, that if the drawer is discharged upon the bill by such laches, it is not competent for the Plaintiff to recover upon the other count,
(196) for money had and received. As this bill was payable within a certain period after *sight*, a presentment for acceptance was necessary, and notice ought immediately to have been given of the non-acceptance to the person meant to be charged. It is not sufficient, in such case, to wait till the time of payment has arrived, and then to give notice of non-acceptance as well as non-payment. 12 East. Rep. 434. It is a presumption of law that the drawer is prejudiced by the want of notice; and the circumstances of this case demonstrate the wisdom of the rule. If notice had been given to Rodman of the non-acceptance, it would have reached him

before the departure of the ship from the State, and have thus given him an opportunity of identifying himself for any advances for the cargo. The notice of non-payment could have been of no use to him in this view, for it was put into the Post-office after the ship had sailed on her voyage.

It is, however, relied upon by the plaintiff, that this is a case where the law dispenses with notice, since it appears in the case that Riggs owed Rodman nothing, either when the bill was drawn or when it was protested. That such an exception to the rule of giving notice was established in the case of *Bickerdike* v. *Bollman*, 1 T. Rep., 410, and has been acted on in many cases since, cannot be disputed. But it is equally true, that the inconvenience of relaxing the rule has been the subject of regret; and a strong disposition has been manifested by the Judges to qualify and restrain the exception itself. They have accordingly said that actual value in the hands of the drawee at the time of drawing the bill was not essentially necessary to entitle the drawer to notice in case of a dishonor; but if the drawer had good ground to think that he had a right to draw—as where he had made a consignment to answer the bill, though it might not have reached the drawee when the bill was presented for acceptance—or where an acceptance is expected to be made
( 197 ) on the ground of a fair mercantile agreement, and in several other cases depending on the same reason, it has been held that notice is not dispensed with. In the case before us, Rodman had not only ground to believe that his bill would be honored, but he drew it under the express written authority of Riggs; and this I should deem sufficient, of itself, to entitle him to notice. The law, therefore, arising upon the facts before us, is clearly for the defendant. If there be other circumstances belonging to the case which are not incorporated in the statement, the parties will have an opportunity of establishing them upon another trial.

The judgment must be reversed, and a new trial awarded.

(198) BANK OF NEWBERN *v.* PUGH.

*From Pitt.*

A. being indebted to the plaintiffs, came to an agreement with them, that he should make a sale on credit, and take bonds *payable to the plaintiffs:* of which the bank would take such as might be approved, in payment of its debt. A sale was accordingly made by A. who gave notice of the kind of bonds required; and he took from P. for his purchases, a bond payable to the plaintiffs, which was offered to the bank and refused *as a payment*, and returned to A. to proceed on as he might think proper.

*Held*, that by this agreement, A. became the agent of the bank to take and receive the delivery of the bond from P; and that the bond, by the delivery to A, was therefore complete.

*Held further*, that the subsequent refusal of the bank to give A. credit for it, was not an attempt to undo the delivery and avoid the bond.

*Held further*, that, if such attempt had been made, it would be ineffectual—for if an obligee once accept a bond, he cannot afterwards disagree to it so as to make it void.

*It seems*, that, without any previous agreement between the bank and A, this was the bond of P; because the plaintiffs had never rejected it *in toto.*

*Held further*, that it is the province of the jury to decide, not only on the veracity and credit of the witnesses, but also on *what facts* are proved by their testimony; and it is error in the Court to direct the jury to *infer one fact* from another.

*Quere:* Can the Bank of Newbern take a bond payable directly to itself? *It seems* that it may, for a debt due to itself.

This was an action of debt upon a sealed note: plea, *non est factum.* Upon the trial, the plaintiffs gave in evidence the note, of which the following is a copy:

"Six months after date, we promise to pay to the President and Directors of the Bank of Newbern, thirty-one hundred and five dollars, for value received: to which payment we bind ourselves and our heirs, this fifth day of March, 1818.——$3105.

(Signed) "JOHN ALLEN, (Seal.)
"WILLIAM PUGH." (Seal.)

The plaintiffs proved the signature of "William Pugh" to be that of the defendant. The defendant then proved, by M. C. Stephens, the cashier of the bank, that the said (199) note was offered to the bank by John Mooring, for discount, in lieu and payment of one of David Smith, the intestate of said Mooring, for a like amount, and that the bank did not accept it when so offered. Upon his cross-examination, he further proved, that Smith was, at the time of his death, a large debtor to the bank, and that the President and Directors had authorized his administrator, the

said Mooring, to take bonds with approved sureties from the purchasers at the sale of Smith's effects, payable to the said President and Directors, and had agreed with Mooring to receive such of those bonds as they should approve, in payment of David Smith's note to them: That the bond now sued on was one of those taken in pursuance of such authority and agreement; but the bank, doubting its sufficiency, would not accept it in payment, and that the cashier returned it to Mooring, to be proceeded on as he might think proper. This witness likewise stated, (the same being objected to by the plaintiffs,) that the President and Directors had not, to his knowledge, in express terms, either verbally or in writing, directed this suit to be brought, or authorized Mooring to sue on the note in their name; but they were privy to the suit, and were actually indulging Mooring for a portion of his intestate's debt, awaiting the result of this suit, which was carried on by him for his own benefit.

It was further proved on the part of the plaintiffs, that it was made an express condition, at the time of the sale of David Smith's effects by Mooring, that the purchasers should give bonds, with security to be approved by him, in the form of that now sued on.

It was further offered to be proved, that since the note was returned to Mooring, he exhibited it to the defendant, who, with a knowledge of these circumstances, offered to give another bond. This last evidence was rejected by the Court.

The Court charged the jury, that if they believed the evidence of Stephens, the paper writing had not been re-
(200) ceived by the plaintiffs, or by any one under their authority, as the bond of the defendant; and therefore that it was not the deed of Pugh. The jury found accordingly; and the plaintiffs moved for a new trial, because the Court misdirected the jury; and because the Court admitted improper testimony; and because the Court rejected proper testimony. But the motion was refused, and judgment given for the defendant; from which the plaintiffs appealed to this Court.

*Gaston*, for the plaintiffs, said that the points which he now proposed to make in the case were those stated in the record. First: as the case appeared upon the trial, the bond declared on was the deed of the defendant, and the plaintiffs were entitled to a verdict upon the plea of *non est factum*.

Three things are necessary to constitute a deed—writing, to express the certainty of the contract—sealing, the assent of the party—*delivery*, to attest its consummation. If the delivery be made to the obligee himself or to his agent, the act is complete. If it be made to a *stranger* for the use of the obligee, it has been a question of nicety and much controversy, what shall be the effect. There have been decisions, that such a delivery to a stranger, although the acceptance be afterwards absolutely refused by the obligee, constitues a good deed. Taw's case, 2 Dyer, 167; *Alford* v. *Lee*, Cro. Eliz., 54. It is admitted, however, that this is doubted by the great authority of Lord Coke, and perhaps the better opinion may be as laid down by him in *Butler* v. *Baker*, 3 Rep., 26—"that if A. deliver obligation to B. to the use of C. it is the obligation of A. *instanter*; but if it be presented to C. and he refuse it, it loses its force" and leaves the instrument as though it had not been delivered: But even in this case, *non est factum* is not a good plea, "because it had been *once* his deed." Beyond all queston, therefore, if the delivery be made even to a stranger, it is the deed of the obligor *until* the obligee *refuse* to receive it as his deed: The case already cited from Coke shews this; and besides that case, (201) there are these others. 1 Salk., 301: Cro. Eliz., 626, 627. The instrument has never been tendered to the Plaintiffs simply *as the bond* of the obligors, and by them refused *as such:* the tender was made *sub modo* only,—that they should take it and *give up* another. On those terms, they refused to accept it; but that does not vitiate the deed. That condition, which Mooring interposed, was not annexed to the delivery by Pugh; and it cannot, therefore, as regards the legal operation of the instrument, be interposed by Mooring so as to defeat the bond. The plaintiffs have never refused to accept it as Pugh delivered it, unconditionally.

But Mooring was not a stranger. He was the agent of the Plaintiffs. When we consider his previous authority, the bond became canclusively obligatory on Pugh when *he* delivered it. Shep. Touch., 56. It was an express condition of the sale, that an absolute bond should be given, payable to the Bank; and Mooring was authorized to take and receive the delivery of such a bond: when, therefore, he did receive it, as it was given absolutely by the obligor, and received absolutely by the agent of the obligee, it was complete and final. But if any thing more were necessary, on the part of

the Plaintiffs, to shew an acceptance, it exists here; for the very bringing this action is an acceptance of the bond. As to the agreement between the Bank and Mooring, that is solely between themselves—the Defendant was no party to it; nor does it appear that he even knew of it. The most that can be made of it is, that the Bank should take in payment such bonds as were approved, and take *as trustees* for Mooring, those they did not approve.

At all events, the Court erred in assuming to decide upon the *effect* of Stephens's testimony, and instructing the Jury, in so many words, that, if Stephens was believed, the paper was not the deed of the Defendant. Now that would depend upon what was the true nature of the agreement be-
(202) tween the Plaintiffs and Mooring in point of fact—whether it was such as I have supposed or otherwise: and that is an inference of fact to be drawn by the Jury, and not by the Court.

The evidence objected to by the Plaintiffs was irrelevant, and ought to have been rejected. Its effect in the utmost latitude could only be to shew, that the Plaintiffs have not the beneficial or equitable interest in the bond. Take it so and it makes no difference. They are the Plaintiffs of record, and the sole question is, whether they have the legal right.

*Seawell* on the other side.—The case from *Dyer* turns wholly on the repugnancy of the plea, which does not meet the declaration, but states a different obligation. *Alford* v. *Lee* did not depend on this question at all. It is a case of the performance of an award, and even if the release had been tendered personally to the releasee and he had refused to accept it, the action would not have been lost; Cro. Eliz., 143, because a tender alone was sufficient. The most that can be made of that case is, that *non est factum* is not a good plea. Lord Coke says, in *Butler* v. *Baker*, that "*perhaps*" this plea will not be sufficient. In that respect modern decisions shew that he was wrong. In every other particular that case is good law and is expressly in point with us. It lays down the rule in precise terms, that the deed becomes absolutely void by the refusal of the obligee—and the case from *Salkeld* corresponds therewith, and shows that, although the bond *might* at first take effect, yet by the dissent it becomes *void ab initio* by relation. This is proved by all the subsequent

cases—and what may have been the doubts which perplexed the Judges in those old cases, we find the Courts very clear shortly afterwards. In *Whelpdale's* case. 5 Coke, 119. *Taw's case* is overruled by name; and the principle stated, that if an obligation be delivered to one to the use of another
(203) and the obligee refuse it, he can never after assent, and the delivery becomes void and the obligor may say, "it is not his deed"—and this is the true rule, that any thing may be given in evidence under *non est factum*, that shews it is not his deed at the time of the plea pleaded. Shep. Touch., 74; Bul. N. P., 172; Gilb. L. E., 162; Phil. L. E., 127, 361; *Lambert* v. *Atkins*, 2 Cowp. Rep., 272. The doctrine contended for on the other side is alarming to the people of this State, where so much paper, not endorsed, is offered to the Banks for discount. Can the Bank recover on all the bonds that have been made payable to it, offered for discount and been rejected? There is another question not undeserving of notice. If the Bank did accept this bond, or, rather if it intended to accept it, has it the power in law so to do? The Bank is created by its charter—it exists by it; and its powers and capacities which are thus conferred must also be limited by it. By the 11th section of the charter, this corporation is prohibited from "dealing directly or indirectly in any thing but gold or silver bullion or *bills of exchange*," discounted at the rate of $\frac{1}{2}$ per centum for thirty days. They may probably deal safely in endorsed promissory notes, because by the endorsement they become *quasi* bills of exchange. Many good reasons might be given for such a restriction. It is sufficient, however, that such is the enactment of the Legislature. A *bond*, therefore, payable *directly* to the corporation, is void; because the Bank has not the capacity to make such a contract, or take a security in that form.

*Gaston*, in reply.—The point last made is brought irregularly before the Court. The case is here upon a motion for a new trial by the Plaintiff; and if the Court below erred in any one particular, there must be a new trial, and then the Defendant can raise any questions he pleases. I will observe, however, that it will be found upon looking into the charter, that it only controls the subject matter of the traffic
(204) of the Bank, and does not affect to prescribe the form, nature, or effect of the securities, which the Bank shall

or may take to secure a balance or debt due to it, and contracted in the course of a legal traffic.

It is not disputed but that such matter as the refusal of the obligee may be given in evidence under the general issue. But that cannot avail the Defendant, whether Mooring be regarded as a stranger or an agent: For if he be a stranger, the law presumes an acceptance until the Defendant shew a refusal by the obligee. There has been no objection here; but only a refusal to take this bond when it was offered to us coupled with the *condition* of giving up Smith's notes. The Bank did not refuse to receive it *as the bond of Defendant*, as it had been delivered. The case of hardship and danger supposed, is of a bond made and offered to the Bank for discount for the accommodation of the obligor; but this was made for the benefit of Mooring. The truth is, however, that Mooring was not a stranger, but the authorized agent of the Bank; and the case is but the common one of the delivery of a bond to an attorney. At all events, if the Court ought not to have instructed the Jury that it was the bond of the Defendant, the contrary instruction, that it was *not* his bond, ought not to have been given. It should have been left to the Jury to determine whether the circumstances proved a delivery in point of fact.

TAYLOR, Chief-Justice.—The principal question in this case relates to the delivery of the bond: as to which the evidence is, that the Bank authorized Mooring to take bonds, payable to the President and Directors, reserving to itself the right of receiving such as it should approve, in payment of Smith's debt. In pursuance of this authority, the bond was taken: and it appears to me, that the delivery was complete and irrevocable, from the moment it was delivered to
(205) Mooring. The language of the books is clearly to this effect—a deed may be delivered to the party himself to whom it is made, or to any other person by sufficient authority from him; or it may be delivered to a stranger for and on behalf of him to whom it is made, without authority. Shep. Touch. 56. It is true, that the Bank afterwards refused to accept it in payment of Smith's debt and returned it to Mooring to be proceeded with as he might think fit. The evident meaning of this was, that the Bank did not think proper to relinquish the security which it already had, for the sake of the one which it deemed weaker; but allowed

Mooring to proceed and recover the money from the obligor, if he could. This did amount to even an attempt to undo the delivery. But if it had been accompanied with even the strongest declaration to that effect, it could not have been effectual; for when the obligee once by his agreement has made the deed good, he cannot afterwards by his agreement, make it void. Shep. Touch. 68. An opposite doctrine would be pregnant with mischiefs; and in this very case, all the bonds not selected by the Bank must become void, though taken by its authority and with full notice to the purchasers, that they were to be so taken. As there must be a new trial, and as the whole record is not now before us, I will abstain, at this time, from giving any decisive opinion on the other points which have been discussed in the argument. It is possible, that, upon more attentive consideration of the subject, I may doubt the right of the Bank to take a bond for a debt due to itself; but from every aspect in which I have yet seen the question, and from frequent perusals of the act creating the corporation, the strong impression on my mind is, that the Bank may, for debts due to itself, take securities of any form or denomination recognised by law; particularly bonds, bills or notes —Act of Assembly 1804, secs. 5, 7, 11, 12. Whether the Bank can take all or any of these securities for debts,
(206) not due to itself, but merely as a trustee, is a question on which I have not formed an opinion, nor should I willingly pronounce it if I had, until the pleadings shall be amended.

HENDERSON, Judge.—I agree entirely with the Chief-Justice in the very satisfactory opinion which he has given: and I go farther and say, that a new trial ought to be granted, even if the previous agreement had not been made, unless the Jury were of opinion that the Bank had *in toto* rejected the bond. In that case, it would want an essential part of all contracts—the assent of both parties. But it is quite probable from the evidence, that the Jury, if properly instructed, and if their attention had been called to the question, would have been of opinion that the Bank only rejected it *as a credit to Mooring*, and did not intend entirely to annul it: for all declarations or words or signs must be judged of by the intent. The manner in which the Judge instructed the Jury, is to me, also sufficient to warrant a new trial. He charged the Jury, that if they believed the testimony of Stephens,

they should find the paper-writing not to be the deed of the Defendant. Now, *what* Mr. Stephen's testimony *proved, was a thing on which he could not decide:* that belonged to the Jury. In the opinion of the Court, it might prove a total rejection of the bond; while in that of the Jury, only the qualified and *sub modo* rejection just spoken of. The nature of the rejection is an inference of fact, to be drawn from the evidence which the Judge has, improperly, drawn for himself and the Jury both, leaving to the latter, only to say whether the witness swore truly or not. The Jury are the constitutional judges not only of the truth of testimony, but of the conclusions of *fact* resulting therefrom. I would repel the interference of Juries, as far as the law will warrant, in all questions of law; and, in like manner, the interference of the Judge in matters of fact.

With regard to the objection raised in the argu-
(207) ment in this Court, that the bond is void because it is not a subject of traffic allowed by the charter of the bank, unless under special circumstances, those the plaintiffs must shew in the declaration, and prove, and need not be pleaded. I do not think it would be proper to decide on it on this record; for the pleadings are very defectively stated, and the point is for the first time agitated. *Non constat*, but that the plaintiffs can (if at all necessary), bring this bond within its capacity to take according to the terms of the charter; and on the other hand, should it be necessary to plead it, that object cannot be effected in this Court, which can make no amendment.

Judge HALL concurred with his brethren; and

BY THE WHOLE COURT.—Let a new trial be ordered, with leave to the plaintiffs to amend the declaration in any way they may think proper, and to the defendant to plead *de novo*.

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## THE GOVERNOR *v.* JEFFREYS.

*From Wake.*

By the true construction of the act of 1806, the certificate of the Adjutant-General is evidence only in such cases of delinquency of the officers of militia in making returns, as consist in not making returns to himself:

*Held, therefore*, that he cannot certify that a *Colonel of Cavalry* did not make his return to the *Major-General.*

THE GOVERNOR *v.* JEFFREYS.

This was an action of debt brought by the Adjutant-General of the militia of this State, in the name of the Governor, to recover from the defendant, a Colonel of Cavalry, the penalty of fifty pounds incurred by failing to make his
(208) military return to the Major-General of the seventh division, in the year 1818. Plea, *nil debet*. Upon the trial, the Attorney-General offered in evidence, to prove the delinquency of the defendant, the certificate of the Adjutant-General only, that the defendant was Colonel of Calvary in the 17th brigade of militia, A. D. 1818, and that he did not, as Colonel aforesaid, make his return to the Major-General of the 7th division of militia for that year, in conformity with the directions of the act of the General Assembly in such case made and provided. On the motion of defendant's counsel, the Court instructed the jury, that the evidence was not sufficient to maintain the action on the part of the plaintiff, because the act of 1806, sec. 7, the certificate of the Adjutant-General is only evidence, if "it contain such matter as would be sufficient to convict the officer, if delivered by the rules of law in open Court"; and here the Adjutant-Feneral certifies as to a thing not relating to any transaction in or concerning his own office, but as to a matter which he could only know by the relation or return of the Major-General, who therefore ought himself to be in Court to prove it. The Attorney-General submitted to the opinion of the Court, and suffered a nonsuit; but thinking the law to be otherwise, he brought the case to this Court by appeal. The case was submitted here, and

The opinion of the Court was delivered by Chief-Justice TAYLOR:

The single question is, Whether the Adjutant-General's certificate is sufficient evidence that the defendant, a Colonel of Cavalry, did not make his return to the Major-General according to law? By the act of 1806, the certificate is made conclusive evidence against a delinquent officer, provided it contain such matter as would be sufficient to convict the officer, if delivered by the rules of law in any court of record. The certificate here points directly to the
(209) defendant's delinquency, and therefore, it does contain such *matter*, as would be sufficient to convict him, if delivered *ore tenus* by the Adjutant-General. But it is not to be expected, that if so delivered, the examination would

proceed no further; for as, by the same act of Assembly, sec. 3, the defendant is directed to make his return, not to the Adjutant-General, but to the Major-General to whose division he is attached, the knowledge of the Adjutant-General of the defendant's delinquency, could only be officially derived from information given him by the Major-General. Such testimony, therefore, resting on hearsay, would be clearly inadmissible; otherwise the Adjutant-General's certificate would be couclusive, even in cases where the officer informing him had received his information from the one next below him in command, and so down to the commandant of a regiment. It is certainly competent for the Legislature to make such a certificate evidence, though founded upon hearsay; but the intention to innovate upon so important a rule, ought to be manifested by declaration plain. If the law be susceptible of another and more rational construction, it ought to receive it; and its design appears to me to be extended no further, than to relieve the Adjutant-General from personal attendance in those cases where he could give legal proof of the defendant's delinquency; and this will embrace all those cases where it is made the duty of the officer to make his return directly to the Adjutant-General. Further than this, the act cannot be extended by a fair construction of the words, or the evident intent of the framers. Wherefore, the judgment must be affirmed.

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(210) THE STATE *v.* TACKETT.

*From Wake.*

It is competent for one charged with the murder of a slave to give in evidence that the deceased was turbulent; that he was insolent and impudent to white persons.

The whole design of the act of 1817, "to punish the offence of killing a slave," was to make the homicide of a slave extenuated by a legal provocation, *manslaughter*, and to punish it as such; it does not go further and determine the degrees of the homicide, but leaves them to be ascertained by the common law.

At common law, and between white persons, *a slight blow* will not *excuse* a homicide—for that must be on mere necessity.

Nor will *words extenuate* it to manslaughter. But it is not correct to say, "that a slight blow not threatening death or great bodily harm will not extenuate, if the weapon used by the slayer be a deadly one"; because that authorizes the inference, that a blow to constitute a legal provocation, *must* threaten death.

The true principle of the law is, that if he, on whom an assault is made with violence or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in heat of blood and under that provocation, it is but manslaughter.

The general rule should therefore be laid down, "*that words are not, but blows are a sufficient provocation to lessen the crime of homicide to manslaughter.*" From this, there are a few cases which appear to be exceptions—but they depend on very particular circumstances.

But it exists in the very nature of slavery, that the relation between a white and a slave is different from that between free persons; *and therefore*, many acts will extenuate the homicide of a slave, which would not constitute a legal provocation if done by a white person.

This was an indictment for the murder of Daniel, a slave; and on the trial, the evidence was that the deceased had a free colored woman for a wife, who lived on the lot of one Richardson, a carpenter, in Raleigh, and in a house near to that in which Richardson himself lived: that the deceased was generally there of nights: that the prisoner was a journeyman in the employment of Richardson, and lived in the house with him: that on the night when the deceased was shot, he, Richardson, had gone to sleep and was awak-
(211) ened by the firing of a gun, and soon after heard some person come into the room and set something down like a gun, where his generally stood, and that he then turned over, and saw a person going out, whom he thought to be the prisoner, and that in a short time, he heard groans and complaints out of doors, as of one injured: that his gun had a buck-load in it, and his family had been admonished not to use it: that Richardson saw no more of the prisoner that night, and that he did not sleep at home: that about a week or ten days before, the prisoner told Richardson of a fight between himself and the deceased on that day, and said that he would kill him; but the prisoner was drunk when he said so. In consequence of this threat, and of the rumour and belief that the prisoner kept the deceased's wife, Richardson discharged him; but took him back again in a few days, upon his promise to behave better. It was proved by other witnesses, that the prisoner went to a house in the suburbs of the city about 9 o'clock of that night, to which he had before promised to go: that soon after he went in, he said several times "*that he was uneasy,*" and upon his being asked why, he said that he had been down town and got into an affray, and was afraid the constables would have hold of him: that soon afterwards, he said that he had shot a man, a black man belonging to Mr. Ruffin, and that he

believed that he spattered him well, for he took good sight at his legs and thighs, and the fellow hollowed. The prisoner then gave an account of the affair to the witnesses: That he had that night (which was very dark) been down town and was returning home the back way through the lot, and found the deceased lying on his belly on the ground at the window of the house in which the prisoner slept; and the prisoner said that he would then have blown out his brains, if he had had a pistol: that he asked the deceased who he was and what he was doing there, to which the deceased replied only by asking who he was and what he was doing there: that the deceased then got up and told him that Richardson was not at home, and they then (212) went into the yard together, where they remained a short while, and the prisoner went into the house, took Richardson's gun, and returned and shot the deceased, while he was dodging around the turning lathe. The prisoner did not appear to be drunk, and asked permission to stay all night, and went to bed and seemed to be asleep when the Constables came to arrest him: upon being taken, he remarked, without any previous communication of the charge against him, that it was hard to go out of a good warm bed to jail. In a short time after the deceased was wounded, some neighbors, alarmed by his groans, came to him, and a surgeon was sent for, who examined his body, and found a very large mortal gun-shot wound in the front and lower part of the abdomen. It was also proved, that two or three weeks before the homicide, the deceased had said to a witness that the prisoner kept his wife, and shewed a large stick with which he said that he had given the prisoner a beating; and that if the prisoner did not let his wife alone, he would kill him; and that on another night, about a week or ten days before the homicide, the deceased was seen standing at Richardson's gate, and, upon being asked "who he was," said that he was not afraid to tell his name, that he was Daniel, and that the devil had been to pay there; that Richardson had whipped him and driven him off his lot; but he would be the death of Richardson or Tackett one. Another witness, who also was a carpenter, and worked in Richardson's shop, further proved, that about ten days before the deceased came to his death, he came up to a work-bench where Tackett was working in the street very near to Richardson's house; that the prisoner ordered

him off, and the deceased said he was in the street and would not go: a fight then took place between them, but the witness did not see and could not tell how it began: when the witness took notice of them, the deceased had the stile of a window sash in his hand, and he struck the prisoner several times with it, and at one of the blows hurt his eye; and
(213) the deceased also caught hold of the adze which the prisoner took up to strike him with; they scuffled for it, the deceased butted the prisoner and finally succeeded in getitng the adze from him, and carried it off. This witness also stated, that very early in the morning of the next day or the day after, he found the deceased lying in wait in Richardson's garden with two stones in his hands, and the deceased said that he thought the witness had been Tackett, and he had intended to knock his brains out: that after dinner of the day of the homicide, he saw the deceased down town, and was asked by him, where Tackett was; and the deceased then said, that he did not intend that Tackett and Lotty (the deceased s wife) should out-do him; that she had behaved so meanly that he would not have her, but that the prisoner should not take her away from him; and that if he did not let her alone, he would kill Tackett or Tackett should kill him.

The prisoner then offered to prove, that the deceased was a turbulent man, and that he was insolent and impudent to white people: but the Court refused to hear such testimony, unless it would prove that the deceased was insolent and impudent to the prisoner in particular.

In the charge to the Jury, the Court instructed them, that under the act of 1817, this case was to be determined by the same rules and principles of law as if the deceased had been a white man: that murder was a felonious killing of a human being, with malice aforethought, which might either be express, as by declarations or lying in wait, or implied, as from the instrument used: that no words would justify or extenuate homicide, and make it less than murder: that by the Common Law, a slight blow, if it did not threaten death or great bodily harm, would not excuse or extenuate, if the instrument used be a deadly one, as a loaded gun or the like; and that it was of no consequence, at what part of the body the aim was directed, if death or great bodily harm were intended.

The Jury found the prisoner guilty of murder: a motion

was made for a new trial, because proper evidence
(214) had been rejected; and because the Court erred in the charge to the Jury: but it was refused, and sentence of death was pronounced upon the prisoner, who appealed therefrom to this Court.

The case was argued by *Seawell*, for the prisoner, and by the *Attorney-General* for the State.

*Seawell* contended, that the act of 1817 had no other effect than to make the unlawful killing of a slave, without malice prepense, felonious and punishable—in other words, to create the offence of manslaughter, as applied to a homicide of slaves. Before that act, the killing a slave was either murder or nothing; at least such was the prevailing opinion, and great doubts existed on the Bench, as well as with the ablest Lawyers at the Bar. The act was intended to settle that question merely. But it does not pretend to define what shall constitute the slaying of a slave manslaughter: it leaves that to be determined by the Judges, under the ordinary rules of law: and while the Common Law lays down general rules, by which we are to ascertain whether the killing of one man by another, between whom there is no relation, and who stand on an equality with each other, be murder or manslaughter, or neither, and lays down different rules to govern cases in which the deceased stand in particular relations of dependence and inferiority to the slayer, as an apprentice, servant, pupil, sailor or soldier, to his master, tutor, or officer. So here, where the wide distinction exists in the grades of our society between freemen and slaves—whites and blacks; and where the policy of the Law as well as the inveterate habits of our population, and the best feelings of our nature enjoin it upon us to keep these classes as distinct in every respect as possible, and, to that end, to enforce the superiority of the one, and the subordination due from the other, a new rule must be laid down fitted to this state of things, and adapted to this particular relation and the exigency of our situation. A free man, who hath been taught
from his infancy to look for humility and obedience
(215) in a slave, and who feels every moment of his life the vast superiority that he has over him, early learns that tamely to submit to words of reproach from a slave is degrading to the last degree, and that a blow, even the slightest, is the greatest dishonor. At such an insult, therefore, his

passions are inflamed to the utmost pitch; and if, in such a state, he slay the offender, he has a right to claim the benefit of that rule which regards mercifully the frailty and infirmity of human nature. If any precise rule could be laid down, I would say that a *word* from a slave was a provocation equal to a blow from a free man; and the most trifling assault, to a deadly stroke. There is, in the very nature of things, an essential difference between the cases of slaves and free men; and the Court cannot disregard it, arising as it does, out of our population, laws, education, and habits.

But, at all events, the Judge erred in saying that a blow, unless it threatened death or great bodily harm, would not *extenuate*, if the instrument used was a deadly one—Maugridge's case, Kelyng, 135.

The Attorney General insisted upon the words of the act of 1817, which are, "that the killing of a slave shall partake of the same degree of guilt, when accompanied *with the like circumstances*, that homicide now does." The common law declares *what circumstances* shall make one guilty of that degree of homicide called manslaughter, or of that higher degree called murder. These were well ascertained before the statute; and that statute declares, in express terms, that the same circumstances that would constitute the slaying of a white man murder, shall likewise constitute the killing of a slave murder. But there is no feature of manslaughter in this case; and the prisoner is guilty of murder, and may be punished therefor under the acts of 1791, and 1801, without the aid of that of 1817. The evidence offered was
(216) clearly inadmissible; for no words will justify an assault, much less a deliberate shooting another down. There was no evidence that the deceased gave the prisoner any blow; but if he had given a slight blow, the charge was right. East's Cr. L., 234, 236; Fost., 291; 4 Bl. Com., 199.

TAYLOR, Chief Justice, delivered the opinion of the Court:

After stating the points, he observed, that it does not appear from any direct proof in the case, what was the immediate provocation under which the homicide was committed. The evidence relative to that is altogether circumstantial and presumptive, and its weight and effect required the most careful examination and deliberation of the jury. The con-

clusion they might arrive at was all-important to the prisoner, since the degree of the homicide depended on it; and whether it was malicious, extenuated or excusable, must have been determined by them from such lights as they could gather from the facts actually proved, and such inferences as they might deduce from them. It cannot be doubted that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing on this enquiry, and according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behaviour of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under a strong and legal provocation. If, on the contrary, the behaviour of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of the other circumstances. They must still depend upon their own weight and the probability be lessened, that the prisoner had received a provocation sufficient in point of law to extenuate the (217) homicide. The evidence therefore ought to have been received; and this will be the more apparent when the charge to the jury is considered.

The Court directed the jury, that under the act of 1817, the case was to be determined by the same rules and principles of law as if the deceased had been a white man. The act referred to, had no design beyond that of authorizing a conviction for manslaughter, in cases where a slave was killed under a legal provocation. If, before that time, a white person had killed a slave under such circumstances as constituted murder, he might have been convicted and punished for that offence; but if the homicide was extenuated to manslaughter, no punishment was annexed to that offence, and the accused persons were uniformly acquitted. It seemed just to the Legislature, that the manslaughter of a slave should be punished in the same manner with that of a white person. This they have provided for, and it is all they intended to provide for. They did not mean to declare that homicide, where a slave is killed, could be only extenuated by such a provocation as would have the same effect where a white person was killed. The different degrees of homi-

cide, they left to be ascertained by the common law of the country—a system which adapts itself to the habits, institutions and actual condition of the citizens, and which is not the result of the wisdom of any one man, or society of men, in any one age, but of the wisdom and experience of many ages of wise and discreet men. It exists in the nature of things, that where slavery prevails, the relation between a white man and a slave differs from that, which subsists between free persons; and every individual in the community feels and understands, that the homicide of a slave may be extenuated by acts, which would not produce a legal provocation if done by a white person. To define and limit these acts, would be impossible, but the sense and feelings of jurors, and the grave discretion of Courts, can never (218) be at a loss in estimating their force as they arise, and applying them to each particular case, with a due regard to the rights respectively belonging to the slave and white man—to the just claims of humanity, and to the supreme law, the safety of the citizens. An example may illustrate what is meant. It is a rule of law, that neither words of reproach, insulting gestures, nor a trespass against goods or land, are provocations sufficient to free the party killing from the guilt of murder, where he made use of a deadly weapon. But it cannot be laid down as a rule, that some of these provocations, if offered by a slave, well known to be turbulent and disorderly, would not extenuate the killing, if it were instantly done under the heat of passion, and without circumstances of cruelty.

The charge of the Court proceeds to state, "that by the Common Law, a slight blow, if it did not threaten death or great bodily harm, would not excuse or extenuate, if the instrument used was a deadly one." It does not appear from the case, that a blow of any kind was given by the deceased to the prisoner, or that any struggle immediately preceded the homicide; but as it was impossible for the Court to foresee what inferences might be drawn by the Jury from the testimony adduced and the circumstances proved, this part of the instruction was given them, that they might be enabled to estimate the provocation, in the event of their being satisfied that a blow was given. In such a case, the Jury might have been misled if the charge be incorrect: and I think it was so, because it lays down as a general rule,

what is true only under peculiar circumstances, and in cases where a slight blow is cruelly revenged.

The first proposition, that such a blow will not *excuse*, is legally correct; for in order to reduce a homicide to excusable self defence, it is incumbent upon the accused to prove, that he killed his adversary through mere necessity in order to avoid immediate death. It is manifest that such
(219) necessity never could be produced by such a blow as that described. But when the charge affirms, "that a slight blow, not threatening death, or great bodily harm, will not extenuate a homicide, if the weapon be a deadly one," it authorises the inference, that a blow, to constitute a legal provocation, *must* threaten death or great bodily harm. This, however, is no part of a description of a blow, which all the authorities hold sufficient to extenuate. For if it amount to a breach of the peace, and offer an indignity to the person receiving it, it is generally conceded, that it will extenuate the homicide to manslaughter, although a deadly weapon be used. Accordingly, it is laid down by Hawkins, "if one man, upon angry words, shall make an assault upon another, either by pulling him by the nose, or filliping him upon the forehead, and he that is so assaulted draw his sword and immediately run the other through, that is but manglaughter." The same passage is quoted with approbation by Kelyng, 135, and I take the sound principle to be, that if any assault made with violence or circumstances of indignity upon a man's person, be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood, and upon that provocation, it will be but manslaughter. When, therefore, a Court is called upon to pronounce the general rule, it should be that "words are not a sufficient provocation: but blows are a sufficient provocation to lessen the crime into manslaughter." *Taylor's case*, 5 Bur. Rep. 2796. Some cases, however, have been attended with peculiar circumstances, shewing the necessity of a more critical and precise limitation of the rule. The first is *Stedman's case*, quoted in East's Crown Law, 234. In that case, the provocation first disclosed was a box on the ear given by a woman to a soldier: in return, he struck her on the breast with the pommel of his sword; and afterwards he pursued her and stabbed her in the back. Holt was
(220) of opinion that this was murder—a single box on the ear from a woman, not being a sufficient provocation

to kill *in this manner*, after he had given a blow in return for the box on the ear. But it was afterwards held to be manslaughter, because it appeared that the woman struck with an iron patten, and drew a great deal of blood. The other case, is *Rex* v. *Reason & Tranter*, 1 Strange 499, upon which, as reported, Mr. Justice Foster calls it an extraordinary case, that all the circumstances of aggravation—two to one—Mr. Luttrell helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. These cases speak plainly for themselves, and do not amount even to an exception to the rule, but are evidently founded upon the protracted and unrelenting cruelty, with which the prisoners pursued their revenge out of all proportion to the provocation. But if in Stedman's case, he had instantly upon receiving the box on the ear, stabbed the woman; and the officer, in the other case, had stabbed Mr. Luttrell upon receiving the blow with the cane, the cases must have been pronounced to be manslaughter. Upon the whole of the case, therefore, I think the prisoner is entitled to a new trial.

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(221) Den on demise of HUNTER *v.* WILLIAMS.

*From Hertford.*

An instrument, purporting to be a grant for land, which was under the great seal of the State, was signed by the Governor and recorded in the Secretary's office, but was *not countersigned by the Secretary*, will not pass the land, and is void.

Upon the trial of this ejectment, the plaintiff offered in evidence an instrument purporting to be a grant from the State to Blake Baker (under whom he claimed), bearing date in the year 1791, which covered the land in dispute. It was under the great seal of the State, and was signed by Alexander Martin, who was then Governor, and had been recorded in the office of the Secretary of State, and registered in Hertford county, where the land was situate: but it had not been signed by the Secretary of State, nor by any person for him. The Court received it in evidence, but reserved the point whether it was admissible, and the jury gave a verdict for the plaintiff. Afterwards the Court decided upon

the point reserved, that the said writing was not a good and valid grant, and was therefore inadmissible, and directed the verdict to be set aside, and a nonsuit to be entered: and the plaintiff appealed to this Court.

The case was not argued here; and

The opinion of the Court was delivered by HALL, Judge: To the General Assembly alone belongs the power of disposing of the vacant lands within the boundaries of this State. The Constitution, sec. 36, declares that all grants shall run in the name of the State, and bear test and be signed by the Governor. The year after the adoption of the Constitution, the Legislature at their November session, declares that the Secretary shall make out grants for (222) all surveys returned to his office, which grants shall be authenticated by the Governor and *countersigned* by the Secretary. Act of Assembly, 1777, ch. 1, s. 11. This is the only mode pointed out by the Legislature, whereby individuals can acquire a right to the unappropriated lands; and if it be not pursued, no right can be acquired in any other way, sooner than if no mode at all had been pointed out. Nothing, therefore, passed by this instrument; as it is not pretended that Mr. Martin had title individually. The nonsuit must therefore stand, and the judgment be affirmed.

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NUNNERY *v.* COTTON.

*From Warren.*

**Any alteration of a deed or writing, if made by the party claiming benefit under it, avoids it—whether the alteration be in a material and obligatory part, or in an immaterial or in an useless part—provided it be done by design.**

This was an action of debt on a bond payable originally to one *Myrick*, and by him endorsed to the plaintiff. The defendant pleaded, *non est factum*, and the statute against gaming. Upon the trial, the plaintiff proved the bond by the testimony of witnesses who knew the hand-writing of the defendant; which was received, as the bond was unattested upon the face of it. It was contended on the other side, however, that it had been witnessed, and that the plaintiff or his assignor had cut off the witness' name, to prevent his disclosing that the bond was founded on a gaming consideration, or with some other fraudulent intent: and upon the

inspection of the paper itself, it appeared probable enough that the suggestion was true. It was originally written on a small piece of paper, and from the right hand side of
(223) it, where the defendant's signature was, it appeared to have been cut so as to leave the obligor's name, and to go in a sloping direction to the left, where a bond is usually attested, so as just to leave the writing of the body of the bond; and the upper part of the letters of the word "*Teste*" remained still plainly enough to be made out upon a critical examination. They could not have been entirely separated without cutting off some of the words of the bond. The defendant also called a witness, who lived with *Myrick* at the time the bond bore date, who said that he did not know upon what consideration the bond was given; that he knew that *Myrick* and *Cotton* often played at cards about that time, and did not know of any other dealings between them; but that he had no knowledge of the defendant's executing a bond for his losings. The plaintiff objected to the evidence of the gaming, unless the defendant could shew that this particular bond was infected therewith; but the Court received the testimony. The Judge also charged the jury, that if they believed that a witness' name had been cut off by the plaintiff or the indorser, while he had it, or if the word "Teste" alone, or any other word, had been cut off by them, with a view of altering the bond, they should find for the defendant; for that, in point of law, the paper was thereby avoided, and was no longer the act and deed of the defendant. And the jury accordingly returned a verdict for the defendant upon the general issue. The plaintiff moved for a new trial, because improper evidence had been received, and because improper instructions had been given to the jury: but the Court refused the motion, and gave judgment for the defendant, and the plaintiff appealed.

The judgment was affirmed here without argument, by the opinion of TAYLOR, Chief-Justice, and HENDERSON, Judge: HALL, Judge, dissenting.

(224) TAYLOR, Chief Justice.—That a fraudulent mutilation has been made of this bond is manifest from an inspection of it; for parts of the letters which form the word "*teste*" are still remaining: whence the Jury probably concluded, that the witness' name had been taken off for the purpose of suppressing evidence of the consideration. If the

witness' name were taken away, it clearly destroyed the deed, by whomsoever done; since it was altering it in a material part. But if no witness' name were there, and only the word "*teste*" has been cut off, (a supposition difficult to make,) still, if done by the obligee, it equally avoids the deed; and that question of fact was left to the Jury. The only doubt is, whether the word "teste" forms a part of the deed. I think the rule, if stated in precise terms, is, that any alteration in the writing which the parties make to evidence their agreement, if made by the party claiming benefit under it, avoids it; whether the alteration be made in an obligatory or useless part—and more especially if done, as in this case, with a fraudulent design. If the party to whom a bond be given, alter it in an immaterial part, it is conceded, on all hands, that it will avoid it. The reason of the rule is equally applicable to an alteration in an useless part; and *in odium spoliatoris* ought alike to avoid it. It would be dangerous to countenance the least relaxation of a rule which guards so effectually the purity of written documents, upon which the most cherished interests of men depend—nor do I think that the Plaintiff should escape merely with the loss of the debt, if the name of the subscribing witness were cut off with a fraudulent intent. The person doing the act and he who offers the paper in evidence with a knowledge of its having been done, are guilty of a serious offence. The judgment must be affirmed.

HALL, Judge.—It is very probable, from the whole complexion of this case, that the finding of the Jury is
(225) right—but a new trial is moved for because the Judge received improper evidence, and because he misdirected the Jury. As to the first, I agree perfectly with the Judge, that the testimony was proper. But I do not altogether agree with him, as to what was said relative to the alteration of the note or the paper on which the note was written. I admit, that if the bond was altered by the obligee in either a material or immaterial part, it thereby became void. But if a word or words be written on the same paper on which the obligation is written, and they be neither a material or immaterial part thereof; if, in fact, they do not belong to it, and are no part of it, and those words be cut off, the obligation will not thereby be avoided. So, in the present case, admitting that the word "*teste*" (and no other part

of the obligation) had been cut off, I think that circumstance would not avoid it, let the intention be what it might. But a bad intent ought not to be inferred from an innocent or useless act. If the charge had been to the Jury, that, if they believed that not only the word "*teste*," but also the name of a witness had been separated from the paper, they should find for the Defendant on the plea of *non est factum*, there could be no objection to it; for although the attestation of a deed is said not to be of its essence, yet it is a mode of proof agreed upon by the parties, and is so far a part of it. For these reasons, it seems to me, there ought to be a new trial.

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(226) MANN *v.* MCVAY.

*From Person.*

The certificate of the justice of the peace required by the "act to punish persons for removing debtors out of one county to another," is intended solely for the benefit of the person who removes the debtor: it is only a *mode of proof* that the debtor has duly advertised:

*Held, therefore*, that it may be obtained at any time, either before or after the removal: and it may be dispensed with altogether, if the party can make the same proof by other testimony.

This was an action on the case, brought under the act of 1796, for the removal of *Morgan*, a debtor to the Plaintiff, from the county of Person to the county of Orange. The removal was on the 23d day of December, in the evening. On the 13th day of December, in the morning, *Morgan* advertised his intention to remove, at a store and at a tavern in Person, which were both public places, and also at the dwelling-house of J. B., one of the justices of the peace for that county. B. lived on the main road leading through the county, and gave private entertainment to travellers for compensation. The advertisement that was set up at B's was handed to him by Morgan himself, who remarked that he was indebted, and intended to remove, and was unwilling to subject any other person to the payment of his debts, and requested B. to set it up where he thought proper upon his premises, and to do whatever was necessary under the act of Assembly to enable any person to remove him safely. B. then set up the advertisement at his own door, and told *Morgan* that was all that was necessary: and he did not then give him the *certificate* required by the act. The Plaintiff lived five or six miles from *Morgan* and from B.; but he knew of

the removal, and took no steps to prevent it, or to have process served upon *Morgan*. After the bringing of this suit, the justice of the peace gave a certificate of these facts, which was read in evidence upon the trial; and the Defend-
(227) ant also proved them by the testimony of B. and other witnesses given in open Court. On the part of the Plaintiff, the Court was moved to instruct the Jury, that the Plaintiff was entitled to recover, notwithstanding the certificate and the testimony of the witnesses—because the certificate was not given *before* the removal, and because the facts could be proved by such a certificate only: which instruction the Court refused to give. The counsel for the Plaintiff then moved the Court to instruct the Jury that he was entitled to recover, because the house of B. was not a public place: which instruction the Court also refused to give. The Jury found a verdict for the Defendant, who had judgment: and the Plaintiff appealed to this Court, because the Court refused to give the instructions as prayed for. The judgment was entered in the Court below on the second Monday of September, A. D. 1820, and the appeal was, of course, taken to the present term of this Court.

The case was not argued on the part of the appellant.

*Ruffin*, for the appellee.—The utmost the Plaintiff can ask is, that the act should be considered remedial. If it be, then it is to be construed so as to advance the remedy; but not so as to work injustice. It was not designed to tie the poor to one spot, and prevent removals altogether, but only such as might be "to the prejudice of creditors"—of that character are those only which are secret. Such are they in point of fact, and such are they deemed in the act of Assembly; for they are allowed, after advertisement at three public places in the county. The object of the advertisements is to give notice to the creditors; and the three prescribed are deemed sufficient notice to all the creditors. If, therefore, express notice be brought home to the particular creditor suing, it is enough; because the scope of the act is, as to him, satisfied. If the creditor be actually assenting to the debt-
or's removal without advertising, he cannot recover; for
(228) that would be to pervert a law intended to promote justice into an instrument of wrong. The same reason applies to a case where he has full notice, as here, and does not use any means to enforce payment of his debt, or

arrest the body of the debtor. On that ground, therefore, the Defendant was entitled to a verdict.

While, on the one hand, the advertisements are required for the benefit of the creditor, in order that he may get notice, and have an opportunity of securing his debt; so, on the other, nothing will be held to be intended for his benefit but what will tend to give him notice. The *certificate* cannot at all contribute to that end: it is not required to be made public, or in any way communicated to the creditor; hence it follows, that it must have been intended solely for the benefit of the debtor himself, and of the person who might remove him; that the former might, by the exhibition of it, obtain the necessary aid for his removal, because it would shew that he had complied in every respect with the provisions of the law, in giving notice, and enable him at the same time to put into the hands of the person removing him conclusive proof thereof, in a convenient, permanent, and written form. For the relief of the debtor, therefore, the certificate is given: hence it is to be regarded, not as a license to remove, but simply as evidence of his compliance with the provisions of the act. If, however, another chooses, upon his assurance that he has given due notice, to remove him before he has obtained his certificate, he will not be precluded from getting the certificate afterwards: for, like all other proofs, it will be sufficient to have it on the trial. Nor does the act exclude other proof; and, if the parties be willing to run the risk of the memories and lives of witnesses, there is nothing in the statute more than there is in sound reason, to give to the certificate of the magistrate a preference above the higher and more solemn evidence to be derived from the testimony of that same magistrate and other witnesses, given under the sanction of an oath (229) in open Court. Whether the certificate was or was not, therefore, sufficient for the Defendant in this case, the testimony was; and the judgement ought to be affirmed, so far as regards the first point.

The act expressly makes the house of the justice a *public* place *quo ad hoc*, whether it be so in point of fact or not.

The words are "it shall be his duty to advertise his intention of removal in at least three public places of the county, one of which advertisements," i. e. *one* of which *three* advertisements "shall be set up at the door of the justice or such *other public* place *on his premises*, as he may direct."

But the true character of this act is, that of a *penal* statute. It is entitled "an act to *punish* persons for removing debtors." It has no regard to the *quo animo* of the Defendant; and it subjects him to the payment of the sum due, not in satisfaction of the original debt, for which he could then have his remedy over against the original debtor, but as a mere penalty. If this be correct, it is immaterial, whether the opinion of the Court be right or not, because since the judgement below, the Legislature by the act passed at the session of November, 1820, has repealed the act of 1796, upon which this action is brought. The last act has no clause, saving previous rights or pending actions. Consequently the judgment must be affirmed; since, if the cause be sent back, there is no law *now in force*, whereby the Plaintiff could have judgment This rule is applied not only to cases pending in the Court where they were originally brought, but also to cases pending in an appellate Court, where the repealing statute was passed after the judgment in the Court below, and before the decision in the Court of Errors.—*United States* v. *Passmore*, 4 Dal. Rep. 372—*Rex* v. *Justices of London*, 3 Bur. 1456. S. C. 1 Wm. Bl. Rep. 451, called Miller's case.—*Hollinsworth* v. *Virginia*, 3 Dal. 378.—*United States* v. *Schooner Peggy*, 1 Cranch. 103.—*Yeaton* v. *United States*, 5 Cranch. 281.

(230) TAYLOR, Chief Justice, delivered the opinion of the Court:

After repeating the words of the statute, he proceeded to state, that the certificate is intended exclusively for the benefit of the defendant, to enable him to ascertain whether a person, whom he is about to remove, has advertised according to law. If he can assure himself of that fact, and chuses to run the risk of proving it by other evidence, he may do so; and it is of no importance at what time the certificate issues, or whether it ever issues. If he can satisfy the jury at the trial, that the party did advertise according to law, the substantial provisions of the act will be complied with. It seems also to be the clear intent of the act, that the justice's house shall be deemed a public place, within the object of the law; and any other public place on the premises of the justice, which he may direct, must equally be considered so, because the debtor could exercise no control over the justice who was, to a certain degree, in the performance of a judi-

cial act. The charge of the Court appears to have been perfectly correct.

Nothing was said upon the last point taken in the argument: but

BY THE WHOLE COURT, the judgment was affirmed.

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(231) FRAZIER *v.* FELTON AND WIFE.

*From Hertford.*

Motion by appellant, for *certiorari* to bring up the record to this Court, denied on the circumstances of the case:

If the appellee file the record in this Court, he can afterwards obtain a certificate of the failure of the appellant to bring it up: but the Court must look into the record and affirm or reverse the judgment.

It is not a ground for this Court to order a new trial, that the Court below *has not stated the case* on the record: for the appeal is not necessarily from the opinion of the Court on points arising out of the facts at the trial, but may be for error in the pleadings. It is not error for husband and wife to appear by "*their*" attorney: for although they are but one person in law, the husband may make an attorney who shall appear both for him and her.

In an action against husband and wife for a libel, the declaration had two counts: in the first, it was charged that "the defendants combined and contrived to cause it to be believed that the plaintiff was a sot and common drunkard." In the second, it is charged that the defendants "further contriving and intending *as aforesaid*," composed, &c., the libel, &c., with inuendoes applying the words to the plaintiff: upon plea of not guilty, a verdict was found for the plaintiff upon the *second* count only.

*Held*, that the words "*further contriving and intending as aforesaid*," refer to the allegation contained in the introductory part of the first count, and constitute a *sufficient averment* in the second count, "*that the defendants contrived and intended to cause it to be believed that the plaintiff was a sot and common drunkard*," without repeating those words in the second count.

This action had been tried in the Superior Court of Hertford, in September, 1820, and a verdict and judgment had been rendered for the plaintiff; from which the defendants appealed, and duly entered into bond. The appellants did not file the record in this Court on or before the third day of the present term; but about the middle of January, moved the Court upon the affidavit of Felton himself, as stated in the opinion of the Chief Justice hereafter, for a *certiorari* to bring up the appeal, and have the case and record fully made out for the revision of this Court.

(232) The motion was supported by Seawell, and opposed by Gaston for the appellee. After argument, the Court refused the *certiorari*.

The opinion was given by the CHIEF JUSTICE:

The defendants have appealed from a judgment rendered against them in Hertford Superior Court, but have neglected to bring up the appeal within the three first days of this term of this Court, as required by the act of 1818. A *certiorari* to bring up the cause and place it on the docket, is now moved for on behalf of the defendants, upon an affidavit stating that the defendant, Boon Felton, gave bond to prosecute the appeal; that the case to be sent up was to have been made out by the Judge and counsel, who tried and prosecuted the cause; and that he believed everything had been done in the case necessary to a fair trial in this Court. The affidavit further states, that the defendant is just informed that no case has been sent up from the Superior Court; for which he is unable to assign any reason. This affidavit is made before the Clerk in Hertford, and is dated the 7th January, eleven days after the expiration of the time within which the transcript ought to have been filed by the appellants, whose duty it is made by the act of Assembly. It does not appear that Felton made any effort to inform himself before the day the affidavit was sworn to, whether the case had been made out; nor is there any allegation that he applied to the Clerk of the Court below within due time for the appeal: or that he was prevented by accident from doing so. No step appears to have been taken by him to place the cause here, before the affidavit was made. Though the Judge might make out the case, it was not to have been expected that he would bring up the transcript; and as the appellant did not know until the 7th January that the case was not made out, that circumstance could have no influence in preventing him from applying for and bringing up the transcript. For these reasons, it appears to me
(233) that the affidavit furnishes no ground on which a *certiorari* can be awarded.

The appellants also present a transcript of the record to the Court, and urge as another reason for a *certiorari*, that it appears therefrom that they did appeal and gave bond, and that a case was to have been made out by the Judge; and that his omission to do so, ought not to prejudice the party.

It is certain, that in practice, an appeal is most frequent from decisions, which do not otherwise appear upon the record, than as they are connected with it by the case made out. It is competent, nevertheless, for a party to appeal from the judgment, on the record, as well as from points made at the trial.

BY THE WHOLE COURT.—Therefore, the motion is denied.

It turned out, however, that the appellee had, after the third day of the term, actually filed the record with the Clerk, and directed him to docket it, but at the same time observed, that he reserved to himself the right of obtaining from him a certificate of the failure of the appellants to file it. He now applied for the certificate; but the Clerk declined giving it, as the record was now filed by himself, unless the Court should direct it.

In this manner the case was brought before the Court again; when

*Seawell*, for the appellant, insisted that this was not a case for a certificate. The act of Assembly of 1818 gives two modes of proceeding to the appellee, which are in the alternative. He may "*either* file the record at any time during the first or the next succeeding term, *or* obtain a certificate." If he file it, it is to be presumed that his object is to have an affirmance of the judgment, and take the benefit of a judgment in this Court against the appellant and the sureties for the appeal. For that advantage, he must run the risk (234) of having the judgment reversed. It is too late for him to ask for a certificate now: for when the record is once *regularly* in this Court, the whole must be looked into, and such a judgment given as it will warrant.

He then proceeded, at length, to state divers reasons why the judgment should be reversed; which are all taken notice of in the opinion of the Court, and need not be stated more particularly.

*Gaston* contended, that the appellant had, by his failure to file the record, forfeited all right to open it again, and could not be heard against the judgment. He admitted, that if the appellee opened the record to the Court, the whole case was subject to the opinion of the Court, which must then

give such judgment as the Court below ought to have given. But he urged, that the provision, allowing the appellee to file the record, was for his benefit, and he was at liberty to waive at any time before he actually asked for an affirmance of the judgment. He was entitled to be first mover, and if he did not choose to ask anything from the Court, the appellant could not. He likewise submitted arguments in support of the judgment below—if the Court should think proper to go into that matter.

From the record, it now appeared to be an action for a libel, commenced in the Superior Court, and the declaration was as follows, viz:

"*Superior Court of Law, September Term, A. D.*, 1819.

"HERTFORD COUNTY, S. S.—James Frazier complains of Boon Felton and his wife Eliza Felton, in custody, &c., of a plea of trespass on the case, &c. For that whereas the said James now is a just, moral, temperate and well-behaved man and citizen of the State, and as such hath always conducted himself, and until the committing of the several grievances by the said Boon and his wife Eliza, as hereinafter mentioned, was always reputed and esteemed by all his neighbours and other good and worthy citizens to whom he was in any wise known, to be a (235) person of good name, fame and credit: and whereas also the said James hath not ever been guilty, nor until the committing of the several grievances by the said Defendants, as hereinafter mentioned, been suspected to have been guilty of the offences and intemperate misconduct hereinafter mentioned to have been charged upon and imputed to the said James, or of any other such misconduct and infamous manner of living: by means of which said premises, he, the said James, before the committing of the said several grievances by the said Defendants, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy citizens to whom he was known. Yet the said Defendants, well knowing the premises and greatly envying the happy state and condition of the said James, and contriving and wickedly and maliciously intending and combining together to injure the said James in his good name, fame and credit, and to bring him into public scandal, infamy, disgrace and contempt with and amongst all his neighbours, and other good and worthy citizens to whom he was known, and to cause it to be believed that he the said James was a common sot and habitual drunkard, and with intent to vex, harass, and bring him, the said James, into contempt and disgrace as aforesaid, the said Eliza Felton, wife of the said Boon, on the 20th day of July, A. D., 1819, at Hertford aforesaid, falsely, wickedly and maliciously did compose and publish and cause and procure to be published of and concerning the said James, a certain false, scandalous, malicious and defamatory libel, containing amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said James, that is to say—'*His father*' (speaking of John H. Frazier, and meaning the said James) '*has given so much way to the pleasures of Bacchus, that the old man is at all times utterly unqualified for business,*' (meaning and intending to have it believed, that he the said James

was a common sot and habitual drunkard and thereby incapacitated for business.)

"And the said James further saith, that the said Boon and his wife Eliza, further contriving and intending as aforesaid, afterwards, to-wit, on the same day and year last aforesaid, falsely, wickedly and maliciously, wrongfully and unjustly, did compose and publish, and cause and procure to be published, a certain other false, scandalous, malicious and defamatory libel, of and concerning the said James, containing amongst other things, certain other false, scandalous, defamatory and libel ous matters of and concerning the said James, as follows, that is to say, '*His father*, (speaking of John H. Frazier and meaning the said James,) *has given so much way to the pleasures of Bacchus, that the old man* (meaning the said James) *is at all times utterly unqualified for business*,' (meaning and intending thereby to have it believed and understood that the said James was a common sot and habitual drunkard;) by means of the committing of which said several grievances by the said Boon (236) and his wife Eliza as aforesaid, he the said James hath been and is greatly injured in his said good name and reputation, and brought into public scandal, infamy and disgrace with and among his neighbours and other good and worthy citizens to whom the falsity of the charge was unknown, and who thence have believed him to be an habitual drunkard and sot, unfit for business and unqualified for the usual intercourse of social life: wherefore the said James saith that he is injured, and hath sustained damage to the value of three thousand dollars, and therefore he brings suit, &c."

The defendants appeared by *their* attorney, L. M., and pleaded not guilty—justification—to which the plaintiff replied generally, and issues were thus joined. The jury found a verdict for the plaintiff upon both issues upon the *second* count in the declaration, and assessed five hundred dollars damages, and found the defendants not guilty upon the *first* count. There was no bill of exceptions tendered by either side, nor did the record shew any point reserved, nor any case stated. In this Court, no objection was taken to the pleadings, other than those noticed in the opinions of the Judges.

TAYLOR, Chief-Justice.—The transcript having been filed by the appellee, we are now asked to inspect it and to withhold an affirmance of the judgment, if such errors appear upon the face of the record as would be sufficient to reverse it. The Court is of opinion, for the reasons that will be given by my brother HENDERSON, that under the circumstance of this case, it is proper to look into the record. We, therefore, have considered the errors pointed out, and will now give an opinion on them.

The first is, that the husband and wife *both* come by *their* attorney; whereas, being but one person in law, they could

not do so. In support of the objection is cited the case of *Maddox* v. *Wynne*, 3 Salk., 62; but the error assigned there, was that the husband and wife came by their attor-
(237) nies—*per attornatos suos*—in the plural. The principle to be extracted from the case is, that as they are but one person in law, the wife cannot appoint an attorney. Therefore, if an action be brought against husband and wife, if the husband appear by attorney, he shall enter an appearance for both. 5 Com. Dig. Pleader, B. 4. Nor is it error for them to appear by attorney, though the wife be under age; because the husband may by law make an attorney, and appear *both* for himself and wife. 1 Show. Rep., 15. The doctrine is further illustrated by the form of defence given in the precedents—"and the said C. D. and E. F., his wife, by G. H., *their* attorney, come and defend the wrong and injury," etc. 2 Chitty's Plead., 409. In the case before us, the husband was obliged to join in the plea with his wife (Cro. Jac., 239, 288); and the attorney employed by him, necessarily became the attorney of both, and must have pleaded for both. For these reasons, I think the objection untenable.

It is further objected, that as the words themselves contained in the writing, do not impute any offence, but are libellous only by being understood to imply something, it is necessary that the design in using the words should be first averred by way of introduction, and then their meaning stated by *inuendo;* and although an inuendo is stated here, yet the office of an inuendo is not to charge, but merely to act as a *videlecit* to what has been stated.

Without pausing to consider whether the words charged in this declaration are so written, by way of allusion and reference, as to require explanatory allegations—whether it was necessary for the jury to find that they meant to convey the imputation of the plaintiff's being a sot and a drunkard, in order to enable the Court to understand them in that sense; but admitting, for the purpose of this argument, that such technicalities were necessary, I will proceed at
(238) once to enquire whether the necessary averments are put upon record.

The first count in the declaration charges, that the defendants combined to cause it to be believed, that the plaintiff was a common sot and habitual drunkard. The second count, upon which alone the judgment was rendered, charges

them with "further contriving and intending, as aforesaid." This further combination and contrivance relate to the same object, viz., to cause it to be believed that the plaintiff is a common sot and habitual drunkard. The introductory averments in the first count are thus connected with the second count, which then proceeds to state the libel, and concludes with an inuendo, that its meaning and intention was, to have it believed that the plaintiff was a sot and drunkard. The inuendo, therefore, does not enlarge or change the sense of the previous words, but is only explanatory of the matter previously expressed, by applying libel to it. Nor is it of any consequence, whether the extrinsic matter is introduced on the record by averment, recital or general inference; for if the introductory matters and inuendos appear upon the record, they amount to sufficient averments. Cowp., 684 Upon the whole case, therefore, I think the judgment must be affirmed.

HENDERSON, Judge.—The appellee, upon the failure of the appellant, has filed the record here; but he now prays nothing from the Court, and only demands a certificate from the Clerk. I am of opinion, that he is not entitled to it; and that we are bound to look into the record and pronounce such judgment as the Court below should. Upon the failure of the appellant to file the papers in time, two modes of proceeding are given to the appellee by the act establishing this Court. The first is, to obtain a certificate of the Clerk of such failure, and to proceed to enforce his judgment in the Court below by process from that Court. For an
(239) appeal to this Court does not, like one from the County to the Superior Court, entirely annul the judgment of the Inferior Court, but only *sub modo*, that is to say, provided the record is received, and the appeal entertained by this Court. It is otherwise with appeals from the County Court. Before the judgment can ever be acted on, it must be affirmed by the Superior Court. The other mode is, for the appellee to file the transcript himself at any time within the first or second term of this Court after the appeal was granted, and move for judgment of confirmation. By the act of filing the record, the appellee moves for judgment of affirmance. It is the only legal construction which can be put upon his act; for he can have no other legal object in view. And his act points with so much certainty to this object, that he shall

not at the time of doing it, nor at any other time, aver a contrary design. The words can neither qualify nor give to the act an explanation, contrary to the legal intent. We must, therefore, reject the appellee's declarations, made at the time of filing the transcript, and view the appeal as here. Suppose he had not filed the record at this term, but had taken a certificate, on which he had acted; but could not obtain satisfaction by execution from the Court below, against the appellants. He could not at the next term bring up the record, for the sake of his chance for an affirmance, that he might have execution against the sureties also. No more can he have a certificate after once asking for an affirmance; which he does by filing the transcript. He must take one course or the other from the beginning, and abide by his choice.

The appellant's counsel has urged as a reason why the judgment should be reversed and a new trial granted that the Judge omitted to make up a case. He contends that an appeal pre-supposes a case; and as none appears, the remedy must be by new trial, for otherwise, irreparable mischief would be done; and none will arise from it, because
(240) if the merits be with the Plaintiff, the result will be the same upon a second trial. This reasoning would be unanswerable, were the premises correct. But they are not. An appeal does not necessarily pre-suppose a case to be stated by the Judge, from whose opinion, on the case, the appeal was taken. For the appeal can as well be from a judgment on what is called emphatically the record, that is to say, the writ, declaration, pleas, replication, &c., to the issues, verdict and judgment, as from any opinion of the Judge given on points arising in the progress of the cause. This matter is verified in the very case now before us; for the appellant now urges that this judgment ought to be reversed for alleged defects in the declaration, and other errors appearing on the face of the proceedings. For these, and the reasons given by the Chief Justice, I am of opinion, that there ought not to be a new trial, and that the judgment must be affirmed.

HALL, Judge, concurred upon all the points: so that,

BY THE WHOLE COURT, the judgment was affirmed.

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

## JUNE TERM, 1821.

### JUSTICES OF WAYNE *v.* CRAWFORD.

*From Wayne.*

Devise as follows: "I lend to my wife, the plantation whereon I now live, and *after her decease*, I give and bequeath the said land unto my child that my wife is now pregnant with, if a boy, and if it should be a girl, I give the said land to my son H. *upon his paying* unto the said child, if a girl, £100."

The legacy of £100 is not payable until the death of testator's widow.

This was an action of debt on the bond given by Crawford as guardian of Elizabeth Hooks. The Defendant, after Oyer, pleaded conditions performed, and the Plaintiff replied by assigning as a breach, that the Defendant had not collected and accounted with his said ward fer a legacy of 100*l.* bequeathed to her in the will of her late father, R. Hooks.

The case was, that R. Hooks in 1793 made his will, and after giving to his wife one-fifth part of his personal estate, devises and bequeaths as follows: "I also lend to my wife all the plantation whereon I now live, and *after her* (242) *decease* I give and bequeath the said land unto my child that my wife is now going with, if it should be a boy, and if it should be a girl, I give the said land to my son Hillery Hooks, to him and his heirs forever, *upon the said Hillery's paying* unto the said child, if it should be a girl, one hundred pounds." The testator then devises to his son Washington and to the said Hillery other lands in fee, and directs that his personal estate, after the share of his wife shall have been allotted to her, shall be kept together until

his eldest child shall come of age, and then divided equally amongst all the children, including the one with which his wife was pregnant, and that the profits in the mean time shall be laid out in the education and maintenance of all his children. The child with which the wife of testator was pregnant at the time of making the will, was a daughter, Elizabeth; for whose benefit this suit was brought. Soon after the date of the will, the testator died, and the will was proved. *Hillery* was then four or five years of age; but has now come of full age, and has claimed the remainder in the land after the death of his mother, who is still living. The Defendant was appointed the guardian of Elizabeth many years ago, and gave this bond; and a demand was made of this 100*l.* legacy before this suit was brought.

Under the instruction of the Court, the Jury found for the Plaintiff, and assessed damages 244*l.*; being the principal sum of 100*l.* and interest thereon from 1795. From the judgment given thereon, the Defendant appealed to this Court.

*Gaston* for the appellant.—The right of the testator's daughter to have the 100*l.* does not arise until after the death of his widow. The words are express—"*after her decease*" he gives the land. These words are in the beginning of the clause, and qualify all that follows in that sentence. The *pecuniary* legacy to the child, if a girl, is substituted (243) for the devise of *the land*, if a boy. As the latter therefore, would not be an estate in possession, but in remainder after the widow's life estate, so the former shall not be immediate, but await the death of the widow. The legacy is by way of personal charge on Hillery, and as a condition annexed to the devise to him. The words "upon the said Hillery's paying 100*l.*," clearly make it a condition, and a condition subsequent. Co. Lit., 236, b. Pow. on Dev., 246–7–8. The condition being annexed to the devise, the charge accompanies the enjoyment of the land. But it is unreasonable and oppressive to require the performance of the condition and payment of the charge, before that is received which gives rise to them. Every devisee may decline accepting the thing devised, and then the devise and the charge must both fail. Pow. Dev., 443. No *act* has been done here amounting to an acceptance, nor can he be required to do such an act until the moment shall arrive when he can enjoy.

There is no necessity for construing this an immediate bequest, because other adequate and immediate provision is made for the daughter, in common with the other children. The construction put by the Plaintiff not only makes the bequest immediate, but demands that it should be a *charge on Hillery's remainder in the land.* Unless it be such a charge, the Defendant had no means of enforcing the payment. It is not a charge on the remainder; *Wigg* v. *Wigg*, 1 Atk., 382; 2 Mad. Eq, 105, but it is only a condition, for the breach of which the heir-at-law may enter, and he will become trustee for the legatee. But the heir cannot enter until Hillery himself shall do so, after the death of the widow, and then break the condition by a failure to pay the legacy. It cannot be the true construction, which deprives Hillery, who is the primary object of the testator's bounty, of *all*, for the sake merely of hastening the enjoyment of the daughter who is a secondary object of his benevolence. At all events, the instruction was wrong as to the interest. Legacies (244) payable at a future day do not carry interest, except when given as portions for children, for whose support and maintenance no other provision is made. 2 Pr. Wms., 21; 3 Atk., 716; 3 Ves. jr., 10–286; 2 John C. Rep., 628; 1 Sch. & Lef., 5; 2 Mad. Eq., 69.

*Mordecai* on the other side.—This being a legacy charged on real estate, it will sink into the estate for the benefit of the devisee, if the legatee die before the day of payment. 1 Atk. 555. 2 Pr. Wms. 612, and *Coxe's Note.* The case of *Hall* v. *Terry*, 1 Atk. 502, shews that this legacy is a charge upon the land, and that it is such an one as would sink by the death of Elizabeth. It is impossible to suppose, that the testator could intend the provision for this daughter to depend on the contingency of her surviving her mother, and that if she could die first, any children she might leave should be destitute. It was clearly his purpose to provide for the unborn child, by giving it, if a son, land; or, if a daughter, money: and he did not intend the latter provision to be *less certain* than the former. The only way to make it so, is to consider it a charge upon the estate of Hillery arising immediately and *payable immediately* upon the birth of the daughter. There is no reason to suppose that the testator preferred Hillery above his other children. If this be a vested and absolute interest, then, upon the death of the daughter, before marriage or full age, it would be divided

equally among the next of kin, including Hillery. But if it be not so regarded, he gets all, in that event.

All legacies, where no time of payment is fixed, are payable here within two years, and in England within one. There is nothing in this will to alter the general rule. The words "after her decease" relate only to the land, and are meant to shew the time when that shall vest in possession—and "upon" is only to signify the condition upon which (245) Hillery should take the estate, and does not fix the time of payment. He does not say "upon his *then* paying." The circumstance of the charge being on a dry reversion is immaterial. Such a legacy so charged, carries interest from one year after testator's death; and a legacy never carries interest before it is payable, unless expressly directed in the will, or given to children who have no provision for maintenance. *Maxwell* v. *Wettenhall*—2 Pr. Wms. 26. 3 Atk. 438. As to Hillery's not being compellable to elect during the life of the widow—that depends upon the very question here; for if the £100 be due immediately, upon a bill filed, the Court would have compelled him to elect.

*Gaston* in reply —It is not certain that this legacy would lapse by the death of Elizabeth before her mother; for perhaps the antecedent words of the sentence may be considered as vesting it, and that the payment is only postponed. Be this as it may, it ought not to make any difference; for the *hardship* of a lapse is not a sufficient reason for making this an immediate gift. The whole argument on the other side is built on that hardship; and, if successful, will overturn all those cases of lapse, where the words apply to the gift and not merely to the payment of the legacy. The cases of *Maxwell* v. *Wettenhall*, and *Hall* v. *Terry*, do not bear on this case. The *dry reversions* meant in them, are reversions *in the devisor* himself, which he devises as dry reversions, and expressly *charged* with the legacy. Neither of those circumstances exists in the present case. It is an extravagant construction, that Hillery, then only four or five years old, should be held to sell the land for the sole purpose of discharging this legacy to his sister.

TAYLOR, Chief-Justice.—I think it is to be collected clearly from the language of the will, and the authorities applicable to the subject, that the £100 legacy is not payable

(246) until the death of the testator's widow. After lending her the plantation, the testator gives the same land after her decease, to the child his wife is then pregnant with, if a son; but if a daughter, he then gives them to his son Hillery in fee, upon his paying to the daughter the legacy. Upon the birth of the daughter, the remainder, which was before contingent, vested in Hillery; and at the same time the legacy vested in the daughter. But the period at which it is payable is prescribed and pointed out by the same expressions which give the remainder to Hillery, viz., "after his wife's decease" In the face of so plain a declaration of the testator, I do not feel at liberty to conjecture that the legacy is payable before Hillery comes into the possession of the land. Although this legacy is chargeable upon land, and the general rule in such case is, that if the legatee die before the time of payment it shall lapse, yet I think this case comes within the exceptions to that rule. For it was as much the intent of the testator that the daughter should have the legacy, as that the son should have the land, to whom it is given on condition of paying the 100*l.* As this is not payable before the death of the widow, the postponement is made for the convenience of the estate and family, according to the cases cited in *Mr. Coxe's note* to the case in 2 Pr. Williams, 613.

HALL and HENDERSON, Judges, declined saying whether the legacy was vested in Elizabeth and transmissible to her representatives, or would lapse by her death before the day of payment, as the point was not now before them. For the other reasons given by the Chief-Justice, they concurred with him in opinion, that it was not payble during the life of the widow.

Judgment reversed.

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(247) DEN ON DEMISE OF SANDERS, *v.* HYATT.

*From Gates.*

Devise to A, and if he dies without any lawful begotten heir of his body, then to his brothers and sisters. Held that the devise to A. is of an estate-tail, which, by the act of 1784, is converted into a fee simple, and the ulterior limitation is therefore void.

Ejectment.—The lessor of the Plaintiff claimed title to the premises in dispute under the wills of Jesse Sanders and Lawrence Sanders, as follows: Jesse made his will, bearing date the 8th day August 1811, and thereby devised the premises in the following words—"I give unto my son Lawrence the plantation where I now live, and all the land adjoining thereto; and *if he dies without any lawful begotten heirs of his body*, then to his brothers and sisters." Jesse died soon after, and Lawrence entered, and by his will devised the same land to the lessor of the Plaintiff in fee and died, without having ever been married, and leaving brothers and sisters, under whom the Defendant claimed and took possession.

By the direction of the Court in the matter of law, the Jury found a verdict for the Plaintiff; and the Defendant moved for a new trial upon the ground that the limitation over to the brothers and sisters was good and sufficient to vest the title in them. But the Court gave judgment for the Plaintiff, and the Defendant appealed.

The case was argued by Eure for the appellant, and submitted by Seawell for the appellee.

HALL, Judge. The clause in the will gives the land over, if Lawrence should die without a lawfully begotten heir. Now he cannot die without heir as long as the persons live to whom the ulterior limitation gives it upon the happening of that event, for they may become heirs at law after
(248) the death of others more nearly related. The word *heir*, in the singular number, must therefore mean *issue*; and by that means the estate first given in fee is turned into an estate-tail, and by the act of 1784, is converted into a fee simple again in the first taker. The ulterior limitation is therefore void, and nothing passes by it.

BY THE COURT.—Judgment affirmed.

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EXECUTORS OF JAMES REEL *v.* JOHN REEL.

*From Pitt.*

Evidence is admissable of the declarations of a testator made *at any time* subsequent to the execution of the will, which goes to shew that the testator believed the contents of the will to be different from what they really are; or declarations by testator of *any other* circumstances which shew that it is not his will, are admissible.

REEL *v.* REEL.

The following is the case as it appeared reported to this Court in the statement made by the Court below.

This was a case of contested probate of a will between the executors and one of the heirs and next of kin; the paper writing purported to have been published and declared as the testator's last will and testament in the presence of two witnesses: they declared on examination, that the will was executed at the house of William Blackledge, in Newton, between sun-rise and breaksast time on some day in August, 1815: that they were called to the house by William Blackledge, for the purpose of attesting a paper, where they found Blackledge and James Reel alone: that they either saw James Reel write or heard him acknowledge his signature: that they did not at the time know what was the nature of the instrument, but subscribed it as witnesses in James Reel's presence. They believed that James Reel was
(249) not drunk, but sober, that they had no conversation with him, remained but a few minutes, and left Reel and Blackledge together. One of the subscribing witnesses stated that he believed, on his entering Blackledge's house, Reel met him at the door and asked him to witness the paper; that the witness from a fear that he might be signing some obligation or instrument, whereby he might incur liability, attempted to look over the instrument before fixing his signature, when Reel intimated to him not to do so, and said that it was nothing that could hurt him. It appears further in evidence that Reel left Blackledge's house that morning before breakfast; that the will was left with Blackledge, and after Reel's death was produced by Blackledge, enclosed in an envelope, with three seals. The will was in the following words:

"In the name of God. Amen!

"I, James Reel, of Craven county, being of sound and disposing mind and memory, do make and ordain this my last will and testament, in manner and form following:

"*Imprimis*—I direct that all my just debts be paid.

"*Item*—I give the sum of two hundred dollars to the children of my brother John Reel, to them, their executors, administrators and assigns forever.

"*Item*—I give to my brother Levi Reel one hundred dollars, to him, his heirs and assigns forever.

"*Item*—I give to my sister Sally Wintly fifty dollars, to her, her heirs and assigns forever.

"*Item*—I give to my sister Alicia Willis, in Georgia, one hundred dollars forever.

"*Item*—I give to my sister Polly Ernull, one hundred dollars forever.

"*Item*—I give to my nephew Aaron Ernull the debt he owes me and one hundred dollars, besides a reasonable reward for his trouble in superintending my business, to him and his heirs forever.

"*Item*—I give to my nephew Robert Reel, and my niece Susanna Pringle, each five dollars forever.

"*Item*—My friends, William Blackledge and Vine Allen, having heretofore borne the greatest burden of the expenses and labour in supporting the Republican cause in the county of Craven, and being myself of the same political principles, and very desirous of having them supported, I, the better to enable them to continue their support of
(250) these principles, do give to them, their heirs, executors, administrators and assigns forever, the whole of the residue of my estate, both real and personal, except so much as shall be necessary to pay two-thirds of the expenses of building a Baptist meeting-house, at such place in the neighborhood as a majority of the Baptists of the same sect of which my parents were, shall appoint or pitch upon, and to be paid as soon as the other third of the cost of the building shall be properly secured by the members of such Baptist Church. My desire is that no sale be made of any of the property, but that the legacies be paid out of the debts due as they are collected, and if there be not enough due, then, that such as my executors cannot pay out of that fund, be postponed payment till the income of my estate shall pay them, and my executors to have choice in paying whatever legacy first they please.

"*Lastly*—I constitute William Blackledge and Vine Allen, sole executors of this my last will and testament, and revoke all other or former wills by me heretofore made. In witness whereof, I have hereunto set my hand and seal this 23d day of August, 1815, at Newbern.

"JAMES REEL, (L. S.)

"Signed, sealed, published and declared by the testator as his last will and testament, in presence of us,

"THOMAS C. MASTERS,
"DAVID LEWIS.

"As a part of this my will, I further give to my nephew Radford Ernull the debt he owes me and fifty dollars, to him, his heirs and assigns forever. As witness my hand and seal this 23d day of August, 1815.

"JAMES REEL, (L. S.)

"Acknowledged by the testator at the same time, with the foregoing as a part of this his will,

"THOMAS C. MASTERS,
"DAVID LEWIS.

"As a further part of this will, I give to my nephews Moses and Allen Ernull, each twenty-five dollars, and to Stephen Ernull I give the amount he owes. As witness my hand and seal this 23d of August, 1815.

"JAMES REEL, (L. S.)

"Acknowledged, &c., as before,

"THOMAS C. MASTERS,
"DAVID LEWIS."

On the part of the defendant, many witnesses were brought forward, who swore that James Reel lived in the

(251) county of Craven, some miles from the town of Newbern; some of them stated that he had always been a man of a very weak understanding, and from his youth up addicted to intoxication; that his habits of intemperance had exceedingly impaired the little understanding he had from nature; that a short time before the date of the will, he had been confined with a severe fit of sickness, after his recovery from which, his habit of drunkenness became, if possible, more inveterate; that he *always* became intoxicated when the means could be procured, and by one witness he was represented as the greatest drunkard he ever had seen. Two of the witnesses stated, that in Newbern, a place which he often visited, and where they frequently met with him, they *never* had seen him sober; and one of them further swore that he had never seen him in the town, when in his opinion, he was in a state competent to dispose of his property with reason and intelligence. These witnesses admitted he was parsimonious, disposed to use trick in his bargains, asking too much for what he had to sell, and unwilling to give the value for what he bought. The defendant further proved, that James Reel came to Newbern at the election on the second Thursday in August, 1815, and remained there several days afterwards, during all which time he was seen drunk; that some time after the election, he came drunk to the house of one of the witnesses, who resided in Newbern, and remained there during the night; he then talked of his disease, said his home was a terror to him; while others slept he was walking, sometimes he thought himself in Tennessee, sometimes in England, and sometimes in the West Indies; he expressed a fear that the house of the witness was haunted, that he should be taken and carried away through the window in the night; he spoke of a design to travel for his health, and to make William Blackledge and Vine Allen, trustees to manage his business during his absence. On the morning of the succeeding day, Reel did not appear to have been relieved by sleep, but talked as incoherently as
(252) on the preceding night, and left the witness to seek for Blackledge, after repeating his design of making Blacklege and Allen his trustees. This witness, who had known Reel from his childhood, was so struck by his strange demeanor, as to express, at the time, an opinion, that Reel was becoming crazy, or was about to die shortly. On the same day, this witness again met Reel, coming down the

street that led from Blackledge's house, evidently intoxicated, and was informed by Reel that he had not completed his business, but would do it if he thereby was caused to remain a week longer. It was further proved, that in the afternoon preceding the morning on which the will was executed, Reel went to the house of Blackledge, and there spent the night, that he and B. were in the front room alone, and that in the course of the evening Reel went into the supper room, sat at the table and took supper with the family; that at the table he talked of making his will and leaving Blackledge heir to his property, and that he was then intoxicated. It was proved that Reel had been taught at school to read write, and the elements of arithmetic; that he could calculate with figures, read writing badly, that if sober he might possibly with much difficulty have read the will, but if drunk, it would be utterly out of his power. Other witnesses said, that when he was not too much intoxicated to stand, he could read small pieces of writing, notes of hand, &c. There was no evidence that the will had ever been read to him, the whole was in the hand-writing of Blackledge, and no person besides saw any part of it written. It was proved that Blackledge had been Reel's lawyer on some occasion, and was a man in whom he placed much confidence.

James Reel died on the 30th of June, 1818, and it was proved by the Defendant, that repeatedly, from August, 1817, down to four days previous to his death, the supposed testator sent messages to Blackledge to bring or send him his packet of papers. It was not shewn that these messages had
(253) been received, further than that it appeared, the supposed testator had expressed great dissatisfaction at one time that Blackledge had not come as he said B. had promised; and at other times was angry at the failure of these attempts to procure the papers, and declared that Blackledge had treated him ill, and was not the man he had supposed. It was further proved in regard to the reason assigned in the will for making B. and A. residuary devisees and legatees; that the former had borne as great a part as other individual of the expense and trouble of supporting what was called the Republican cause in the county of Craven; but that the latter had not contributed as much as others for that purpose. The Defendant then offered to prove, that at various times, between the date of the supposed will and the death of James Reel, the said James had repeatedly

mentioned what he believed to be the substance of the will left in the hands of Blackledge; and that according to that representation, the said Reel understood the contents of the will as materially different, and indeed, utterly variant from what it appears on its face, particularly in regard to the residuary clause giving his estate to Blacklege and Allen, which Reel believed to be a gift to the publick. This evidence the Court refused to receive, unless it should be of declarations immediately upon the tranaction, or so soon thereafter as to form part of the *res gestæ*. The residue given to B. and A. was supposed to be worth $3,000; the testator had no wife or children, but left brothers and sisters, and the children of deceased brothers and sisters, with whom, according to the Defendant's witnesses, he had always associated on terms of affection.

On the part of the executors, several witnesses testified that James Reel, though never a man of bright intellect, had *ordinary* capacity, and whenever sober enough to stand, had understanding sufficient to manage his business; that he was the owner of a farm and a mill, generally lived (254) alone, sold the products of his farm and mill, lent money at interest, took obligations for the payment of it, was not easily defrauded, and took care of his property. That at the periods of elections, he sometimes became angry with his brother the Defendant, because their political sentiments were different, and that then he would declare, Defendant should have none of his property. That the fit of sickness before spoken of, occurred about three years before his death, and that he complained that his relations neglected him. About two months before he died, he gave the key of his chest, containing bonds, accounts and money to a witness, with instructions to return the key to him when demanded, or to deliver it to Blackledge; that he said he had a will in Blackledge's hands, and had told one of his sisters who had asked him for one half of his mill, that her legacy was in Newbern under three seals, and asked her what she would do with a mill. Some time before his death, on being told that if he disliked his will he had power to revoke it, and make another, he replied, he knew that, but he believed his relations cared no more for him than for a brute, except for what they might obtain from him, and that he was willing, and indeed preferred that his will should stand, remarking at

the same time to the witness who proved this, that he should have as good a share of his property as any of them.

The presiding Judge instructed the Jury, that the first point to be considered by them was, whether Reed had a capacity to make a will, and that if he had sense to make a legal contract, if he knew how to read, write, cypher, and manage a plantation, it was sufficient evidence he had capacity for such a purpose.

That the second enquiry was whether he was so drunk at the time of executing the will, as not to know what he was doing, and that as to the enquiry, the testimony of the subscribing witnesses, if believed, proved that he was not so drunk as not to know what he was about.

(255) Thirdly, that if the Jury could discover any evidence that the testator was impossd on by Blackledge in making the will, so as to sign a disposition of his property which he did not intend, they might on that ground set the paper aside, but that there ought to be proof to that effect; and

Lastly. that there was no evidence of revocation.

The Jury found the paper writing produced to be James Reel's will.

The Defendant moved for a new trial, on three grounds; 1st. The rejection by the Court of material and proper evidence; 2d. Misdirection of the Court; 3d. Because the verdict was against evidence and law. The motion was overruled, and the judgment of the Court pronounced that the will was duly proved; whereupon Defendant appealed.

*Gaston*, for the appellant.—I. The Court rejected proper evidence on the part of the appellant.

The object of the evidence was to shew by Reel's repeated declarations what he believed to be the will he had signed, in order, with the other facts proved, to establish a fraud in the writer of the will, one of the executors and principal devisees.

There is no instrument, however solemn, against which fraud may not be averred—*Fermon's case.* 3 Rep., 77.

Whenever fraud is averred, parol evidence to prove it is always admissible.

Fraud cloaks itself under forms, and legal sanctions; and if you are not permitted to go beyond these formal sanctions, the law which permits fraud to be averred against them is *felo de se.*

That parol evidence may be received to shew fraud in obtaining a will, see *Small* v. *Allen*. 8 Term Rep., 147.

Wherever parol evidence is admissible, the declarations of a person are testimony against himself and all claiming under him by a subsequent title—*Guy* v. *Hall*. Murphey's Cases, 1 vol., 150.

(256) Both parties here claim under James Reel, whose declarations are offered, and claim subsequently to them. 1 Swimb., 23, 24.

The admissibility of the evidence is not only established by these general principles, but sanctioned by precise authorities—*Trimmer* v. *Bayne*, 7 Ves jr., 518; *Warner* v. *Matthews*, 4 Ves. jr., 186 to 210; *Bibb* v. *Thomas*, 2 Wm. Blackstone, 1043; Cowper, 52, 53; 4 Mass. R., 702, 708.

*Gaston*, on this point, was here stopped by the Court.

II. The Court misdirected the Jury. In the following particulars:

1. "That if he was not so drunk as not to know what he was doing, he was fit to make a will." Now a degree of drunkenness which would not prevent him from knowing what he was doing, but deprive him of judgment to direct the disposition of his property, is sufficient to disqualify him from making a will. "It is not sufficient that the testator be of memory, but he ought to have a *disposing* memory, so that he is able to make a disposition of his lands with understanding and reason, and that is such a memory which the Law calleth sane and perfect memory." 1 Ch. Rep., 13; 6 Rep., 23; 2 Bl. Com., 497; 1 Swimb., 18, 118.

2. "That the testimony of the subscribing witnesses *proved* that he knew," &c. The Judge has no right to pronounce on the *effect* of evidence. Act of 1796, ch. 4. If he be competent to pronounce he has pronounced wrong—for the subscribing witnesses had no conversation, and no means of knowing his state of mind or knowledge of what he was doing.

3. That they might set aside the will for fraud if they could discover any—but that there must be proof of it. While the Judge pronounces there is proof that Reel was sober, he in the strongest language intimates there is no proof of fraud. How can it be said there is no proof when it appears that Reel was a man of naturally weak intellect; a habitual drunkard; always drunk when in town;

(257) drunk for ten or eleven days without intermission; drunk and silly the night before the will was written; drunk and silly the next morning; drunk throughout that day; drunk on the night while the paper was written; it is impossible that he should not be besotted in the morning; he goes to Blackledge to get a power of attorney written; when he gets there the design is changed for a will; Blackledge, his attorney, in whom he reposes all confidence, writes it; Reel could not read it himself; there is no proof that Blackledge ever read it to him; the estate is all given away to Blackledge and his associate, and Reel's repeated efforts to procure the will are all ineffectual. And yet the Court tells the Jury if they could discover *any* evidences of imposition, they might say it was fraudulent, but they must have proof!!

As to the finding of the Jury. If there be a well-founded doubt upon it, there ought to be a new trial—inasmuch as the inheritance is forever bound by it—*Baker* v. *Hart*, 1 Vesey, 29; *Pemberton* v. *Pemberton*, 13 Vesey, 297.

*Mordecai*, for appellees.—Evidence of parol declarations, contradicting and subverting the written declarations of a party's intentions, executed and attested with all the solemnities which the law requires for the purpose of preventing fraud, perjury, and imposition, should certainly be received with great caution.

Such evidence introduces all the danger which can arise from false and corrupt witnesses, who will swear to declarations which they never heard—from the inattention, stupidity or forgetfulness of witnesses, who misrepresent what they did hear; and from loose and ungarded expressions of a testator, and expressions which he may have used purposely with the view of concealing the manner in which he has disposed of his property; to prevent dissatisfaction (258) among those who hope to be the objects of his bounty.

It is contrary to the spirit of our statute laws to admit such evidence. Wills are required to be in writing; but if you permit a will in writing to be set aside by evidence of parol declarations, you thereby set up the will which the law makes, in place of that which the testator has made; and there seems to be little difference between setting up a parol will, and setting aside by parol a will made in writing. Again, our law says that a will in writing

shall not be revoked by parol: Why? Because of the danger of perjury. But does not the same danger occur in such evidence as is offered here? You shall not prove that a written will was revoked, for fear of perjured witnesses, but if the same persons will swear that the will never was made, it may be heard; because, forsooth, there is not the same danger: In fact, there is more, for while evidence of parol declarations of revocation was received, the law had defined what expressions would amount to a revocation, but as to this evidence there is no gauge. Estates will depend more than ever not only on the integrity and understanding of witnesses, but on the whim of jurors, the capacity of the Advocate and the integrity of the Judge—and although from the nature of things, this hazard must be encountered in all judicial proceedings, I should not be disposed to give greater credit or put more to risk in any case than necessity demands. If such evidence is received at all (which were it *res integra* I should think very questionable), it should be confined to declarations made at the time the will was made, or so near as to form a part of the *res gestæ*—a time when the mind of the testator was called to the business in which he was engaged; when it cannot be supposed he said anything relative thereto with a view of concealing or misrepresenting the manner in which his property was disposed of: when the attention of the by standers would probably be called to the matter in hand: when those whom the testator
(259) thought worthy of his confidence would be present, and when no expressions would probably be attributed to him unless they were actually used.

But it is said the evidence is *relevant*, that the jury should have heard it, and given it such weight as it merited. The evidence if admissible is certainly relevant; but it by no means follows that all elevant evidence, by which I mean such evidence as, if true, will conduce to enable a jury to arrive at a correct result, is admissible. Upon the principle of relevancy, if that were the sole test, hearsay evidence, the declaration of persons interested would be admissible, and if it were possible that a jury could be composed of such materials as that they could sift the false from the true, such evidence should and would be received; for as the object of evidence is to elicit truth, it makes no difference what the nature of the evidence is, provided the desired result can be obtained. Evidence of hearsay or of declarations would be

admitted, and their weight left for the jury to ascertain; but why are they rejected? Not because we will not respect truth when derived from such sources, but because it would be impossible for a jury composed of mere men to ascertain what is true and what is false. Reasons of policy therefore direct its exclusion.

As it cannot be assumed as a criterion of the admissibility of evidence, that it tends, if true, to prove the issue; as the policy of our law, as expressed in the acts of our Legislature, does not favor the introduction of such evidence as is offered here; as it appears to be of dangerous tendency, and reason would direct its exclusion; let us examine what is said by *authority*, the other witness of the law. I had expected that the appellant would have produced some authority to shew that evidence of this kind has been received; but I have been disappointed.

It is admitted that parol evidence of the declarations has been received—1, to rebut an equity; 2, to explain a latent ambiguity; 3, to shew a fraud practised on the testa-
(260) tor.

As to those cases in which it has been received to rebut an equity, it will be found generally that they were confined to what passed at the time of making the will, or so near as to form part of the *res gestæ*. And these cases are stronger than that now presented to the Court. The legal operation of the will gives the property to the executor, but from some circumstances apparent upon it, the Court of Equity deems him a trustee for the next of kin. The parol evidence which is received, is for the purpose of supporting the legal operation of the will, and rebutting an equitable presumption. The Court restrict it to what passed at the time; surely a greater latitude would not be allowed to evidence, the effect of which is destroy the instrument altogether, than is allowed to evidence in its support.

The cases upon this point are *Gainsborough* v. *Gainsborough*, 2 Vern. 252, the testator charged his real estate with payment of his debts, and made his wife executrix. Evidence of his declarations that his wife should have the personal estate clear of debts, and that the person who wrote the will omitted it through fraud or ignorance, was received. This was only to rebut the equity of the next of kin; and that the evidence was confined to what passed at the time the will was made, may be collected from the case itself, and

moreover appears expressly by the case of *Lord Granville* v. *Dutchess of Beaufort*, 2 Vern. 648, which was decided soon after. In the latter case the Lord Chancellor says, that *Foster & Murl*, the leading case, was an innovation, and that he yields to its authority contrary to his own opinion. The proofs taken in this cause, and which were thus reluctantly admitted by the Chancellor, were as to directions given to the person who wrote the will, and forming a part of the *res gestæ*—not his *subsequent* declarations as to what those
(261) instructions were. In the case of *Batchelor* v. *Searle*, 2 Vern. 736, evidence of the person who drew the will, as to the testator's declarations, evidently made at the time, was received. In the *Duke of Rutland* v. *Dutchess of Rutland*, 2 P. Wms. 210, the declarations proved were made when the will was executed. Page 214, the Chancellor says, "After all, I own that the allowing parol evidence is exceedingly dangerous, and *not to be done in cases of discourses at a different time from that of making the will.*" In *Rachfield* v. *Careless*, 2 P. Wms. 158, parol evidence of direction of testator to *the scrivenor*, that executor should have the surplus, was received.—*Blinkhorn* v. *Feast*, *2 Ves. 28*—*Nourse* v. *Finch*, *1 Ves. jr. 358*—*3Bac. Ex'r & Adm'r, H. 5*—2 *Ibid*, *Evidence, G.* In *Harris* v. *Bishop of Lincoln*, 2 P. Wms. 137, to explain a latent ambiguity, evidence of what the testator directed *when he ordered his will to be written*, was received. And if a Chancellor is thus cautious in trusting himself with evidence of this kind, it cannot be said that we have too little reverence for the intelligence of a Jury, if we do not trust them with it.

The same course has been pursued by Judges in Courts of Law, appears from *Thomas* v. *Thomas*, 6 T. Rep. 677, in which Lord Kenyon says, "It seems the learned Judge did right in rejecting the evidence, the *supposed declarations having been made by the testator long before the will was made*, though had they been made at the time of making the will, I should have thought them admissible evidence." Now if declarations made before were not admissible, neither are those made after. If those made after are admissible, those made before would be, though they would not be entitled to the same weight, because the testator might have changed his mind. But both are equally *relevant*. In *Doe on demise of Small* v. *Allen*, 8 T. Rep. 147, parol evidence was given of questions asked by the testator at the *time of executiug his will*, as to

( 262 ) its contents to set it aside on the ground of fraud. And these two cases shew the distinction for which we contend—that evidence of what passed at the time, or so near as to form a part of the *res gestæ*, is admissible—that evidence of declarations made at other times is inadmissible.

The case of *Jackson* v. *Kniffen*, 2. John, 31, is a very strong one. The testator was married to a second wife, by whom he had no children: he was 80 years of age: he had been watched by his wife and a woman who lived in the house who had a legacy given her, and his children debarred access to him. It was offered to be proved by one of the subscribing witnesses and others, that the testator had frequently declared to them that he had been forced to execute the will; that he should have been murdered if he had not; and that an hour before his death, while expecting immediate dissolution, he called upon them to bear witness that the instrument was not his will; that it had been extorted from him through fear of being murdered. The evidence was rejected. Two of the Judges dissented; one of them has given his opinion at length—he relies upon the authority of *Nelson* v. *Oldfield*, 2 Vern. 76, which seems very questionable. *Nelson* v, *Oldfield* was a will of personal property, the trial of the validity of which belongs *exclusively* to the Spiritual Court, 1 Bridgman, 610. The will had been proved in the Spiritual Court, and therefore, says the Chancellor, not to be controverted in Chancery. Now the evidence, if admissible at all, could only be received for the purpose of shewing there was no will. This question had been decided in a Court not only competent but exclusively competent. And it is strange that when the Court was called upon to enforce the payment of a legacy, ( a matter in which the Spiritual Court had concurrent jurisdiction, ) it should acknowledge the validity of the will and refuse to respect it. The question was not made, the evidence was received *sub silentio*. We may ( 263 ) infer that the evidence was offered in the Court of Probate and rejected, and so far the case is in our favour.

The Judge (*in Jackson* v. *Kniffen*) adds, "I think the evidence should have been admitted, and especially after it had been proved, that the devisor had been guarded and watched over after the date of the will; that it had been taken out of his custody and detained, notwithstanding his application for it, for the purpose of cancelling it, and that his children

were denied access to him." With humility, I must be permitted to question the correctness of this opinion, which makes the admission or rejection of this evidence dependant on anything extrinsic. If it was not admissible without the existence of the other circumstances, I cannot see how their existence could make it so.

There is another case upon the same point, decided by Judge Story, *Smith* v. *Fenner*, 1 Gallison, 170, an authority precisely in point, and no light one.

It is true, that if evidence of this nature is rejected, fraud may be successfully practiced, but many more will be effected if such evidence should be received: Perjuries will be encouraged—the last wills of testators defeated. Evils exist on both sides, a wise magistrate will choose the least.

*Seawell* for the appellee, commented on the authorities cited by counsel for the appellant, contending that they did not apply, though some of them established the doctrine that parol evidence might be received of declarations *accompanying acts*, to shew the *intention* of the acts.

That such evidence as was offered in the present case was inadmissible, would appear from Richardson's law of last wills, 279—2 Bac. Ab. "Devise," 309.

The rule of law as to drunkenness and capacity in a testator, is laid down in the very language used by the Court below, in Shep. Touch., 403.

(264) The charge as to the testimony of the subscribing witnesses did not infringe the powers of the jury, or violate the act of 1796. To say that the subscribing witnesses *proved*, if believed, is in substance the same thing with saying, the subscribing witnesses *said*.

*Gaston* in reply.—It is in terms conceded that parol evidence is admissible to support the averment of fraud, and yet such evidence is asserted to be against the spirit of the statutes requiring will to be in writing and forbidding parol revocations.

There is no point of the law the *spirit* of which ought more to be observed than that which declares its abhorrence of fraud, and pronounces all fraudulent acts void. If a signature be procured by fraud to a testament, it is not a written *will*, it is *no* will. T. Raym., 334. And as to the spirit

of the statutes forbidding parol revocations, we had none such, and parol revocations were admissible.

It is also conceded that where parol evidence is admissible, declarations of the testator may be received. Now it should be remembered that these are not received as a privileged sort of hearsay evidence. The rule as to hearsay evidence applies only to declarations of third persons, *witnesses* not on oath. Philips, 176; *Guy* v. *Hall*, 1 Murph., 150. The exception as to *res gestæ* applies only to hearsay evidence, and not to admissions of parties. Such declarations are received as admitted facts as against those admitting them and their privies.

But it is insisted that the admissions of a testator are not receivable unless made at the moment; and this is attempted to be supported by reason and by authority.

1. By reason: It is said they "may not have been serious—may be misunderstood—may have been made to deceive." To this we answer—All this is possible, and it is right that such suggestions should be weighed. The same objections might be made to proof in a suit between (265) A. and B. of B's admissions, but yet the evidence would be received. The whole foundation of this objection is, that those who should *weigh* evidence are not competent to do it. It is an objection to trial by jury—not to the admissibility of testimony. But it is said, "there is the same reason against it as against a man's declarations to impeach a *deed* he has made." To this we answer—It is not so. In *that* case he is making evidence by his own declarations *for himself*; or he is disinterested, and therefore his *oath* is better than his mere declaration. A testator cannot be examined on oath when a will is in contest. A testator cannot have an interest to make testimony against what he wishes to take place.

2. "By authority:" *Jackson* v. *Kniffen*, 2 John., 31, in this case there was no argument; it was decided by a bare majority, and that a vacillating majority. It goes *too far*, and therefore proves nothing—for it forbids *any* declarations of testator from being received. It purports to be founded solely on the statute of frauds forbidding parol revocations, and therefore has no application here. It alleges to be supported by adjudications which do not uphold it. See 1 Vesey, 440; 5 Coke, 69; 2 P. Wms., 135; *Cheney's case*. It differs materially from the present case, because he knew it

was unduly obtained, and yet did not revoke. See Livingston's opinion. Here Reel supposed his will to be other than it was and therefore did not revoke. The opinion of the minority is a conclusive refutation.

The case from Gallison is a mere *nisi prius* decision, made by a Judge who is an eminent *civilian*, accustomed to decide both law and fact. It is erroneous on its face, for it admits *declarations made before*, evidently an inferior species of evidence; and assigns bad reasons: 1. "Such declarations are in the nature of *hearsay*." 2. "They are suspicions," (therefore they should be well *weighed*.) 3. "*Light* sayings of testators should not do away wills *deliberately* executed," (266) (but I ask who shall say if *light*—who pronounce if *deliberate*.) The case is clearly one in which the evidence was so unavailing that it was easy to mistake as *improper to be heard*, what was only *unfit to be regarded*.

Several cases from Vernon and P. Williams are relied on, which seem to shew that in rebutting an equitable presumption, little or no reliance should be placed but on declarations at the time. These are well explained in 2 Fonb., 131; 2 Ves. jr., 473; *Trimmer* v. *Bayne*, before cited, and the cases collected by Roberts. *Blinkhorne* v. *Feast*, 1 Ves., 28, relied upon as contained in Bacon, only contains a caution as to any parol evidence.

There is no reason to support this alleged restriction of *admissions* to the moment of the act. There is no such restriction in analagous cases of admissions against parties or privies after the admission. There is no authority to support it which can command obedience.

Against such a supposed restriction is the admitted existence of the general rule that declarations are evidence against the declarer and all claiming under him after the declaration. It is the right of the jury who weigh to have full possession of all that can be weighed. The authority is express of the Supreme Court of Virginia, and of the Supreme Court of Massachusetts. In *Nelson* v. *Oldfield* such declarations were received and made the sole foundation of a decree. *Warner* v. *Mathews*, 4 Ves., jr., notwithstanding all the comments on it, shews that when *parol evidence* is admitted in a testamentary case, declarations of the testator may be received without restriction to the *time*. *Trimmer* v. *Bayne*, 7 Ves. jr., conclusively shews the same thing. True it was offered to repel a presumption, but being for that pur-

pose admissible, *all* declarations before, at and after may be received. *Mole* v. *Thomas* and *Burtenshaw* v. *Gilbert* are cases of acts not unequivocal in their nature, and therefore
(267) admit of parol evidence to shew *quo animo;* but they establish that when such parol evidsnce is admissible, declarations before and after, as well as at the time, may be received. Cannot parol evidence be received to prove how it was read to testator? And if so, may not testator's declarations be proved? *Pemberton* v. *Pemberton* is conclusive to shew not only this, but to meet the suggestion that a *Court* may be trusted but a *jury* cannot. See 13 Ves., 301.

As to the Judge's charge, the reference to Sheppard's Touchstone, page 403, is in point against it.

HENDERSON, Judge, delivered the opinion of the Court:

We are of opinion that a new trial should be granted, because the declarations of the alleged testator were rejected. What weight they might have had with the Jury it is not our province to decide; but coming from a source not interested to declare any thing but the truth, and not affecting the rights of others, (for no one here could have an interest in the will,) we are at a loss to perceive any solid grounds for their rejection, as the ascertainment of truth is the object of all trials.

The reasons assigned by the presiding Judge, are, in our opinions, entirely insufficient, although he is supported by two decisions in our sister States. When declarations of a party are offered in behalf of the person making them, on the ground of their being a part of the *res gestæ*, it is when some of *his acts* are offered in evidence against him, and in order that the Jury may view the whole transaction, what he says when he does the act, is also to be heard, the declarations being in law a part of the act itself.

But the declarations of a person *affecting the rights of others*, can afford no rational ground of conviction that suchde clarations are true: to receive them in the case first put, when they affect only the party who makes them, and to reject them when they affect the rights of others, is conform-
(268) able to the object of all trials, the ascertainment of truth.

To our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose

fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and (with due deference to the opinions of those who have decided to the contrary, we say it) they are received, not upon the ground of their being a part of the *res gestæ*, for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their *competency;* those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace.

The English books are full of cases where the declarations of the testator were received, and without any objection as to their *competency;* generally the question being as to their *weight.* In the case of *Pemberton* v. *Pemberton*, 13 Ves. Jun. 290, before two successive Chancellors, the declarations of the party at *various times* were received; so in the case of *Warner* v. *Matthews*, 4 Ves. Jun. 186: nor is it an objection that in some of the cases it was not a question on the probate of a will, the will having already been proved in the Spiritual Court; but in cases where relief was sought under the will, the relief was objected to, because the Complainant claimed under a will irregularly obtained. As was urged at the bar in this case, if the declarations of the testator were competent to be heard in the Court of Chancery to prevent relief being afforded under the will, they were competent to be heard on the issue *devisavit vel non*, the establishment of the truth being the object in each case.

(269) For these reasons and those given by Judge Spencer, who, together with Judge Tompkins, dissented from the opinion of the Court, and because of the doubt which rested for some time on Judge Livingston's mind, we think we are bound to disregard the opinion of a majority of the Court in 2 *Johns.* 31; and also the case in 1 *Gallison*, 170; and indeed, we have only to read the case in Johnson to cause us to pause long, before we adopt a rule, which, by its operation, would palm upon the world the writing there under consideration, as the will of the deceased.

I am aware that some part of the reasoning in this case, although not important to a correct decision of the cause, impugns the case of *Schenk* v. *Hutchinson* in the late Supreme Court, 2 Law Rep. 432. I then thought both the act and

the declarations stood on the same ground, and that a weak prop was given to the declarations by making them part of the *res gestæ;* both or neither should have been received: a man's acts, which he can perform, are as much within his power as his words, in each case he was making evidence for himself. For these reasons, we think there should be a *new trial.*

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

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## JUNE TERM, 1821.

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Executors of JOHNSON *v.* TAYLOR and the Administrator of Dew.

*From Edgecombe.*

The proper construction of the act of 1795, ch. 15, is, that it is incumbent on an infant, after arriving at full age, not only to "call on his guardian for a full settlement," but to have a final adjustment of all accounts, matters and things, with his guardian, within three years; and either sue for any balance which may be due him, or notify the securities to the guardian bond of the situation in which he stands to the guardian. Without such conduct on the part of the infant, the securities are discharged.

This was an action of *debt* brought on a guardian bond against Taylor, the principal, and the administrator of Dew, a deceased security. The breach assigned, was the non-payment by the principal to the ward, upon his arrival at age, of the estate to which he was entitled. Among other pleas put in by the administrator of Dew, were the following: First, that his intestate had been dead more than seven years before claim made by the ward; and secondly, that the ward had not, within three years after coming of age, called on the guardian for a full settlement of his guardianship. To these pleas there were replications and issues thereon. The
(272) ward came of age in October, 1814, and this suit was instuted on the 26th of August, 1818. Dew died, and administration was granted on his estate in 1806. In September, 1817, Taylor, the guardian, made payments to the ward on demands made on him as guardian by the ward.

Upon the charge of the Court below, the Jury found a

verdict against the administrator on both pleas, and a motion for a new trial having been overruled, and judgment rendered against the administrator, he appealed to this Court.

*Gaston* for the appellant, commented on the acts of 1715, ch. 48, and of 1795, ch. 15, on which these pleas were founded. He contended, that as to the act of 1795, the words and spirit of it require that within three years after the ward's arrival at age, he shall have exacted a complete liquidation of the accounts between him and his guardian, or at all events shall have done what was in his power to effect it; that the phrase "to call on a guardian for a *full* settlement," used in the act, was not at all ambiguous; it was perfectly understood, and was the universal language in filing a petition or bill to account. The term "full" settlement must mean a *final adjustment.* The spirit of the act is to exonerate securities from liability beyond the amount ascertained within the time prescribed in the act; because, during that time, the matters are recent, vouchers may be produced, witnesses are alive, and therefore orphans shall not, as *against securities*, postpone the adjustment; they may trust the *guardian* if they choose, but if they do, they trust *him only.*

As to the act of 1715, he referred to the case of *M'Lellan* v. *Hill*, (Conf. Rep. 479.)

*Mordecai*, for the appellee—1st. Suits brought to (273) this Court must be governed by the rules prescribed for bringing writs of error, there being no trial of the fact in this Court. Now in a writ of error, *all the persons* against whom judgment is given, must join. *Waller* v. *Stohoe*, (1 Ld. Ray, 71); *Rouse* v. *Etherington*, (2 Ld. Ray, 870); *Ginger* v. *Cowper et al*, (2 *Ibid.*, 1403.)

And all must join, though the error should be only as to one of several defendants, (Styles 406, Bacon "Error" B.); *Laroche* v. *Wasbrough and Mailand*, (2 Term R., 737). This appeal therefore is improperly brought up by our defendant. But if this Court will sustain the suit, then, 2dly, the Legislature did not intend by the act of 1795, to bar suits in three years. Whenever they have meant that actions should be barred by the statutes of limitation passed at various times, they have said in the act that suits shall not be brought. (*Vide* acts of 1715, ch. 27; 1808, ch. 8; 1810, ch. 18). So when they intended to bar suits on bonds after they should be

negotiated, they say the statute of limitation shall apply to them, (1786, ch. 4). The phrase, "*call for a settlement,*" must be construed in its ordinary acceptation, and no man would understand it to mean *bringing suit;* nor did the Legislature mean that sureties to a guardian bond should be absolutely discharged after three years, unless suit was brought within that time: had they so intended, they would have said so expressly.

HALL, Judge.—The policy of the act 1795, undoubtedly, is to lighten the burthen of securities and free them from state demands, when a remedy might have been had if promptly prosecuted against the real debtor.

The intent of the Legislature would not be effectuated if the injunction upon the creditor to call for a full settlement meant a *mere call* for such a settlement and nothing more. If that is the case, such call, and a total disregard of it by the guardian within three years after the infant's (274) arrival at full age, would leave the securities in the same situation in which they were before the passage of the act.

I think it is incumbent on the infant, after arriving at full age, not only to call for a full settlement, but to have a final adjustment of all accounts, matters and things, with his guardian, within three years; and either sue for any balance that may be due him, or notify the securities to the guardian bond of the true situation in which he stands to the guardian. In the latter case, the securities, if they apprehend any danger from their securityship, may, by legal process, compel a speedy adjustment of accounts between the creditor and debtor, so as not to be injured by any future and distant call that may be made on them for the insolvency of their principal. Nothing short of such conduct towards the securities will, in my opinion, satisfy the act of 1795, ch. 15, on which the defendant rests his defence; and as such has not been observed, I think a new trial should be granted.

TAYLOR, Chief-Justice, and HENDERSON, Judge, concurred.

## DELACY *v.* NEUSE RIVER NAVIGATION COMPANY.

*From Wake.*

**When a corporate body strikes off the name of one of its members, without giving him previous notice of their intention so to do, and affording him an opportunity of being heard in his defence, a *mandamus* to restore will be granted.**

This was an application for a *mandamus*, originally made to the Superior Court of Wake, and upon its refusal to grant the writ, brought by the appeal of the petitioner to this Court.

(275) The petitioner stated on affidavit, that he subscribed for 250 shares in the Neuse River Navigation Company, established by acts of the Legislature passed in 1812, ch. 89, and in 1816, ch. 16. That for the purpose of paying his first instalments on the 1st of May, 1818, be entered into a contract with the President and Directors of the Company, whereby he engaged on his part, within six months to afford a passage between Stone's Mills and Fort Barnwell, on the river Neuse, for boats carrying 7 tons, and within three years for boats of 14 tons. The President and Directors on their part contracted, at the end of six months, or sooner if the stipulated work were sooner completed, to pay to him $1,000 in addition to what he might be indebted for his stock, including the first payment of $10, and all further sums which the Directors might have called for; and at the end of three years or earlier, on completion of the work, to pay as much as would, with what he should have received, make up $30,000. If at the end of three months from the date, the petitioner should not have begun and made proportionate progress, the President and Directors were at liberty to annul the contract, and claim of petitioner a penalty of $1,000, and so at any other time in the progress of the business, if the work should be unnecessarily delayed, a like power was reserved to them to annul the contract and claim the penalty. The petitioner further stated that, in pursuance of this contract he immediately commenced his labours, and effected the object as far as time would permit, but was stopped by order of the Directors, who, on the 4th of February, 1819, put an end to the contract, declaring it null. That the President and Directors (without authority) and without giving the petitioner notice of their intention, had stricken his name from the list of subscribers, in consequence of which he had had been denied his franchise of voting at a general meet-

ing of the Company. He therefore prayed a *mandamus* to be restored to his franchise of a corporator from which
(276) he had been wrongfully removed.

A notice issued from the Court below to the President and Directors by name, to shew cause why a *mandamus* should not granted, on the return of which, the application of the petitioner was refused.

*Gaston*, in support of the *mandamus*, took the following grounds: 1st. The petitioner was a member of the Company entitled to all the franchises attached to his number of shares, and by the Constitution he can be disseized only by the law of the land; it is no good objection to say, he does not become a corporator until he has paid the first instalment; for the 4th section of the act of 1812, ch. 88, makes them all corporators, gives to them the power of appointing officers, and provides that the corporate body may make a rule for immediate forfeiture of the shares of those who do not pay. The words too, of the act are express, that the subscribers shall be incorporated from the time of their subscription. 1812, ch. 89.

2d. The President and Directors had no authority to strike petitioner's name from the list of stockholders. The only power given is expressed in the act of 1812, ch. 89, sec. 7, and ch. 88, sec. 4: the first instalment is to be paid *at the first general meeting* to be held for choosing President and Directors, and on failure of payment, the names of those who fail may *then and there* be struck off the books, and others paying may be substituted. Now every subscriber having a freehold in his franchise, cannot be divested thereof but by the general law of the land, except in the *precise mode* indicated by the acts of incorporation: that mode *permits* it to be done on one occasion only, viz., at the first general meeting, and by those incorporated, the subscribers; and should this authority not be exercised at the first meeting, *another* mode is pointed out for securing payments.—See latter part of the 4th section of the act of 1812, ch 88.

3d. If the President and Directors had power to
(277) strike from the roll the name of one not paying, it cannot be in a case where the payment has been dispensed with, and a contract between them and the corporator substituted, and there exists a dispute between them and him as to its performance. The power of the President and

Directors to declare the contract a nullity, is specially given at the end of three months, provided it be not then begun or properly done; the power at any other time is only in case of unnecessary delay, and here unnecessary delay is not pretended. It is not any part of the stipulation between the parties that if Delacy shall not perform these covenants on his part that he shall *forfeit his shares*; and can these Directors say that he shall incur a forfeiture not contained in the contract? As to the general doctrine of *mandamus*, he referred to the following authorities—(Bacon "*mandamus*") *Bagg's Case* (11 Rep., 93—3 Burr, 1267—2 *Ibid.*, 999, 1043—Cowp., 378—3 Bl. Com, 110). And to shew that in this case the notice was properly directed, were cited (2 Salk., 433, 699, 701—3 Salk., 231—1 Ld. Ray., 559).

*Seawell, contra*, insisted, that it appeared by the charter that the subscribers should, at the first general meeting, when the President and Directors were chosen, pay the first instalment to the Treasurer, or their names should be stricken from the list. The charter is silent as to who shall strike off, but it is a fair inference that the President and Directors are to act in all cases where the power to be exercised is not specially delegated to the stockholders or subscribers. In this case petitioner admits that he has never paid, and it does not appear from his case that he has ever performed his contract, the performance of which was substituted for payment. The rule moved for on the President and Directors, is to show cause why a *mandamus* should not issue to *admit*. The President and Directors *cannot admit*, and the writ cannot issue to the corporators, for they are not
(278) named, there must be persons capable of doing the act required, to whom the writ is directed.

But if this be deemed an application for a *mandamus to restore*, the applicant should have shewn a *prima facie* title, which he has not done—(3 Term Rep., 577). An equitable title is not sufficient—3 *Ibid.*, 651). The rule in Court below, which was discharged, being that the writ should issue to the President and Directors, this Court having only appellate jurisdiction, cannot change it, and the writ must conform to the rule, or it is supersedeable—(2 Stra., 879).

Taylor, Chief-Justice.—This is a motion for a notice to issue to the defendants, to shew cause why a *mandumus*

should not issue against the defendants, to restore the relator to his franchise as a corporator in the company. It appears from the affidavit that Delacy became a subscriber on the 13th April, 1818, and was admitted as a corporator from thenceforth until after he made a contract with the President and Directors, by which he was to pay for the stock he had subscribed to. If after this contract had been put an end to, Delacy had been called upon to pay his subscription, and upon neglecting to do so, or on not shewing a satisfactory reason for neglect, he had been ejected from his place as a corporator, it would have been incumbent on the Court to inquire into, and give an opinion on the right of the stockholders so to proceed. What he could have shewn on such a notice, either as payment, or excusing the neglect, cannot be told; but *prima facie* we must take it to be the undoubted right of every man to receive notice of any proceeding against him by which he is to be deprived of acknowledged rights; and for want of such notice in the present case, the rule ought to issue as prayed for in the petition.

Hall, Judge.—By the fourth section of the act of 1812, chapter 88, which by the act of 1816, ch. 16, as well as many other sections of the act of 1812, are adopted as part of the charter of the Neuse River Navigation Company, it is declared, "That each subscriber shall pay for every share by him or her subscribed, at the first general meeting, the sum of ten dollars to the Treasurer of the Company—and the names of those who fail to pay, then and there may be struck off the books, and others complying with this regulation may take such shares." The name of Delacy was not struck off at the first meeting, nor did he make any payments on account of the shares subscribed for by him. But he states, that in lieu thereof he contracted with the President and Directors to do certain work on the river Neuse. He admits that the work was not completed, and that the President and Directors declared the contract to be at an end, according to the power reserved to them in the contract to do so if they thought proper.

(279)

When this declaration was made, the parties stood in the same situation they were in at the first meeting, except that that meeting had passed away and it was too late to pay the first installment at that meeting. But when it shall be kept in view, that it was by the consent, and no doubt at the re-

quest of Delacy that payment had not been made, and that he had failed to do that which was a substitute for it, I think the equity and justice of the case, and the fair construction of the act of Assembly, would place the parties in the same situation at a subsequent meeting as they stood in at the first, so far at least as that Delacy then had the power and privilege of making payment, and if he did not, that the stockholders had the right of striking his name from the list of subscribers for shares. But it seems that his name was struck off by the President and Directors, and not by the stockholders at one of their meetings. I think the President and Di-
(280) rectors, in doing this, transcended the limits of their authority; but this entry, by which the name of Delacy was stricken off, was afterwards virtually adopted by stockholders as their act; for they refused to receive Delacy's vote at an election for President and Directors, and had he had due notice of such procedure before it took place, I think from that time he would have ceased to be a member of the corporation. Nor do I think the case would have altered from the consideration that he had been a member from their first meeting up to that time—for every person who had subscribed for shares before he paid his first instalment, was a member to many purposes. He might, perhaps, have voted for President and Directors—for passing by-laws for the government of the corporation—he had, perhaps, to the last moment of the meeting to pay his first instalment. And for the same reason, Mr. Delacy might have exercised the right of a corporator at any subsequent meeting before his name was struck off for failing to make payment. But I suppose he possessed no more rights at any subsequent meeting before his name was struck off, than he did at the first meeting. It has been said that Delacy possessed more shares than the stockholders who struck off his name from the books, and that there were not a majority of course at that meeting. If those who were present, were qualified by having paid up their instalments, and were a majority of those that had done so, I think think they were authorized to act as they did; for Delacy, owing to his delinquency, might by them be stricken off, as he might at the first meeting have been. But what is to be done if Delacy refuses to pay anything due on his shares? I cannot think the law contemplated a sale of them—for besides the positive words in the act that directs the names of delinquents to be stricken

off, the 4th section of the act of 1816, speaking of sales, (not, to be sure, with a view to this question,) speaks of sales of *balances* due, meaning no doubt balances due after
(281) payments had been made. To purchase a share when nothing had been paid, would be to subscribe for a share. But another circumstance ought not to pass unnoticed, and that is, that Delacy *had not notice* that the corporation was about to strike off his name from their books. If he had had notice he might have shewn, for aught that appears, that he had paid his instalments, or that he was ready to do so. For this reason, and for this reason only, I am willing that a *mandamus* should issue.

Henderson, Judge.—The applicant was once a corporator, for it was not imperative on the stockholders at their first meeting to strike off those who failed to pay. They did not do it, they received him and others without requiring payment; he voted with them as a corporator; in fact, their order of removal shews that he was, before the removal, one of their body. I shall pass over every other point made in the case but one; that is, that the applicant was removed by the stockholders at some meeting subsequent to the first, for failing to make payment, and this *without any notice* to him; for it may be considered as a removal by the stockholders—they recognize the act of the directory. It is a fundamental principle of our law, and recognized in every Court of justice, (and this corporation was a Court when passing on the rights of its members,) that no man shall be condemned or prejudiced in his rights, without an opportunity of being heard. No matter how desperate his case may appear to be, the humanity of the law says, perchance he may have something to say in his defence; we will, therefore, not forestall him by saying he can allege nothing; but after having heard him, will pass upon his case. For this reason I think the *mandamus* should go; for without prejudging the case, we do not know but that the applicant might have paid, or shewn some satisfactory reason for not paying, or that he then might have paid, for it was not even then too late. As to some cases which are to be found in Term Reports,
(282) that no notice is required when it appears clearly that the applicant has nothing to offer in his defence; for the present it is a sufficient answer to say, that it does not appear that Delacy had nothing to offer, or could not, by

paying the money, avert the forfeiture. When a case of that kind arises, it will then be time enough to examine the soundness of the doctrine. I am therefore of opinion, that the Superior Court of Wake should issue a *mandamus* to the corporation, commanding it to restore the applicant to the rights of a corporator, or shew cause to the contrary.

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## TISDALE *v.* GANDY.

*From Nash.*

**Where a suit was referred to arbitrators, who returned their award in vacation, when the Clerk entered it on the record as a judgment rendered in Court, such entry was ordered to be expunged, and the whole proceeding was held to be void in law; and this, although the party to be affected by the entry gave a subsequent release of errors, for the consent of parties can never alter the law.**

This was a motion to vacate a judgment, made upon the following facts. A suit depending in Nash County Court between the plaintiff and defendant, in May 1815 was referred to arbitrators, and the order of reference was renewed from term to term until August 1815. On the 25th of September 1815, the arbitrators returned an award in favor of the present defendant, and thereupon a writ of *fi. fa.* issued against the present plaintiff, bearing *teste* August Term 1815. On this *fi. fa.* the Sheriff returned a levy, and writs of *ca. sa.* issued afterwards against the plaintiff until February Term 1817, when the Sheriff returned that he had committed the body of the plaintiff to prison. At November Term

(283) 1818, the plaintiff moved, pursuant to previous notice to the defendant, to vacate the judgment whereon execution had issued, 1st, on the ground that the writ of *fi. fa.* had been levied and the property was not sold, or the levy otherwise discharged; and 2dly, for that the said judgment was not rendered, or entered of record in *term time.* The County Court vacated the judgment, and the defendant appealed to the Superior Court. During the pendency of the proceedings in the Superior Court, Tisdale, the plaintiff, executed to Gandy, the defendant, a release of all claim to vacate or reserve the judgment by reason of any errors and irregularities in the proceedings. The Superior Court affirmed the order of the Court below, whereupon defendant appealed to this Court. There were several affidavits filed in the Court below to support the facts on which the motion was

made, and these affidavits made part of the record sent to this Court.

TAYLOR, Chief-Justice.—This is a motion to vacate a judgment on an award, on the ground that it was entered up in vacation instead of during the term, and the first enquiry is, was it so entered? If we look only at the transcript of the record sent up by the Clerk of the Superior Court, we perceive that the cause was referred at May sessions, 1815, and the judgment is entered at August of the same year. This, however, is but a transcript of the record sent from the County to the Superior Court, and can at best be only a copy of the record accompanying the appeal. A certified copy of the record of the proceedings in the County Court is filed in this Court, and relied upon by the Plaintiff, by which it appears that the cause was referred at May sessions 1815, and that the order of reference is brought forward to August sessions of the same year, when it is renewed, and an agreement subjoined that the award of the referees, made between that time and the Superior Court, is to be entered as a judg-
(284) ment of the term, by consent of parties. It is evident, then, that no award was made at that time, otherwise the parties, to whom it must have been known, could not have consented to the future making of the award. The entry of judgment made at the same sessions was in pursuance of the agreement, and must, in the nature of things, have been inserted by the clerk after the award was returned. If any doubt remained on the subject, it is completely removed by the date of the award, which forms a part of the same transcript. It was made on the 25th of September, 1815, in the vacation, and after the Superior Court, the first day of which was the 18th of the same month. It is thus shewn, without travelling out of the record, or referring to the affidavits of the referees, that the judgment of the County Court was entered up in vacation, by the clerk, in partial execution of the previous agreement of the parties, though contrary to it as to the time of making the award.

This whole proceeding is therefore void in point of law, nor could any agreement of the parties, even if the award had been duly made in other respects, give it a legal existence. It was the judgment, not of the *Court*, but of the *Clerk*, whose acts cannot acquire a judicial authority by the consent of the parties, which can never alter the law. Nor can

any subsequent release of errors by the party to be affected by this entry, give it the validity of a judgment. Such a release is not of more forcible obligation than a previous consent, which in the case of *Slocumb* v. *Anderson*, was held to be utterly unavailing, though it was a confession of judgment for a just debt. In that case it was decided, that no acquiescence, admission or acknowledgment of the party being any more competent to validate, than the first acknowledgment was to create. The judgment of the Court is, that the entry on the docket of the County Court, purporting to be a judgment, be expunged.

HALL, Judge.—I agree in the result, that the clerk
(285) should be directed to expunge the judgment by him entered in vacation; and to me it seems a sufficiency, appears on the record sent to this Court by the appeal, to authorize it. The affidavits read in the Court below, were the grounds on which the motion was made there; the same affidavits form part of the record sent here. It is not necessary that they should be entitled, or have a caption. The caption of the record of which they are a part is sufficient.

HENDERSON, Judge, concurred, and

BY THE WHOLE COURT.—Let the entry on the docket of the County Court of Nash, purporting to be a judgment, be expunged.

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Doe on Demise of JOHN STEPHENSON *v.* JACOCKS.

*From Perquimans.*

A. by his will, devised to his son W. certain lands, reserving to his wife a life estate in part thereof, and declared it to be his will, in case the child with which his wife was then pregnant should be a male, that after her death, the portion in which she had a life estate should descend to such child: and in the event of the death of his son W., or the death of the child with which his wife was pregnant, if a male, that the survivor should have the whole, if either died without lawful issue:—if both died without issue, then that J. S a nephew, should have a portion of the land. The wife was delivered of a daughter, and it was held that J. S. took nothing, for a precedent estate becomes a precedent condition, or otherwise to an ulterior limitation, according to the intent, and as no son was born, the contingency upon which the testator designed his nephew to take, never happened. The language of the will made the birth of a son a condition precedent, and there was no evidnce of intent to dispense with the performance of the condition.

STEPHENSON *v.* JACOCKS.

*Ejectment.* The following special verdict presents the facts of the case. Thomas Stephenson being seised and possessed of the premises in dispute, by his last will and testa-
(286) ment duly executed to pass lands, dated the 21st of February, 1800, devised as follows, viz., "I give and bequeath unto my son William Stephenson, the land and plantation whereon I now live, called Stephenson's point, containing four hundred acres, more or less, reserving the part lent to my wife during her natural life; also I give unto my son William the land I bought from the executors of William Humphreys, deceased, also fifty-three acres of land on the west side of Deep creep, reserving and excepting nevertheless, and it is the true intent and meaning of this my last will and testament, that in case the child which my wife Elizabeth is now pregnant with should be a male, my will and desire is, that the part of my land and plantation which is lent to my wife during her life as aforesaid, should descend at the death of my wife to the said child she is now pregnant with in case it should be a male, to him and his heirs forever. Further, it is my will and desire that in case of the death of my son William, or the death of the child which my wife is now pregnant with, if a male, my will and desire is, that the survivor shall have the whole of the estate mentioned herein to them both, if either should die without lawful issue. But in case of the death of them both without lawful issue. But in case of the death of them both without lawful issue, then it is my will and desire that John Stephenson, son of Hugh Stephenson, should have that part of my land which was my mother's dower; and my will is, that the other part of my said land should be rented out annually for the benefit of my daughter, Polly Stephenson, during her natural life; and in case she my said daughter, Polly, should have lawful issue, my will is that such lawful issue should have and enjoy the said land forever; but in case my said daughter, Polly, should die without lawful issue, then my will is, that the said land shall be rented out annually, and the money arising therefrom to be equally divided among the sons of my sister, Parthenia Wyatt, viz.: William, John, Thomas, Ambrose, and Worley,
(287) and their heirs forever." The said Thomas Stephenson died in the year 1801, without having altered or revoked the said will, which has been duly proved and recorded; that William Stephenson, the first devise above mentioned, died in the year 1806, intestate and without issue;

that Polly Stephenson died in the year 1809, without issue; that the child with which the testator's wife was pregnant at the time of making the said will, was afterwards born a female, and is the wife of Jacocks, the Defendant; that the Defendant's wife is now the sole heir at law of Thomas Stephenson, the testator, and also of William Stephenson, the devisee; that John Stephenson, the devisee mentioned in the will, is the lessor of the Plaintiff; that the premises claimed by him in this suit, are the same devised to him in the above will, being a part of those devised to William in the first recited clause, and the Defendant is in possession of the premises.

On this finding, judgment was rendered below for the Defendant, and the Plaintiff appealed.

*Ruffin* for the Plaintiff.—The limitation to the lessor of the Plaintiff is good

This is an *executory devise*, and is limited upon an event not too remote. 1st. It is an executory devise—the estates to William and the unborn child are *in fee*. The act of Assembly dispenses with words of limitation in the first devise to William; and that to the *infant* is *expressly* to him and *his heirs* forever. It became *co instanti* a fee. Suppose William had died before the issue was born, if a *contingent remainder*, it was gone, because the subsequent limitation would *vest in possession*. 2d. The limitation is *not too remote*: "but in case of the death of them both without *lawful issue*," means issue living at *the time of their death*—(*Cro. Jac. 590.*) If so, such a devise is good. In England, this devise would create an *estate tail*, and it would be held that the limitation
(288) over is after an indefinite failure of issue: the reason is, the *benefit* of the issue, to let them in after the father's death. But our courts should contrue it as a devise of a *term* would be construed in England; for they stand on the same reason. A term cannot be entailed there, a freehold cannot entailed here; there the *issue* as such cannot take *in succession*, nor can heirs of the body here. And in England the devise of terms after a *dying without issue* is held to mean, issue living at the death of the first taker—*Target* v. *Gaunt*, (1 P. Wms. 432)—*Forth* v. *Chapman*, (Idem 663)—*Jones* v. *Spaight*, (1 Law Rep. 544.)

But in this will it is clear that the testator *meant* to confine the failure of issue to the *death* of his sons.

1st. Because in the cross remainders between themselves, his words are, "if either die *without issue*, then the *survivor* shall have the *whole*."

2d. He limits an estate for life to his daughter *Polly;* and the limitation to the lessors of the plaintiff is on the *same event*

If it be objected that one of the lives is that of a *child unborn* at the death of testator, and therefore the limitation thereon is too remote, we answer that a child *in ventre sa mere* is in *rerum natura* to *all* intents. *Wallis* v. *Hadson*, 2 Atk., 117; *Roe* v. *Clarke*, 2 H. Bl., 399; *Long* v. *Blockale*, 7 T. Rep., 100; Buller, J., in *Thelusson* v. *Woodford*, 4 Ves. jr., 227, S. C., 6 Cruise Dig., 530.

As to the words "in case *both* should die, etc., *then* over, etc.," they do not make a *condition precedent*, but a *limitation;* and it is the same whether the preceding estate never took effect (*no* child, or no *such* child being born), or whether it did take effect, and hath determined, (that is, a male child was born and died without leaving issue). *Jones* v. *Westcombe*, 1 Finch's Ch. Rep., 316; *Andrews* v. *Fulham*, Strange, 1193; *Gulliver* v. *Wricket*, 1 Wils., 106; *Strathan* v. *Bell*, Cowp., 40.

(289) The *birth* and *sex* of another child was *only* a condition to the estate devised to *that* child, and does not affect the ulterior limitations; for it is a *general rule* that in all cases of remainders or conditional limitations over, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before limited, by a conditional limitation, if the precedent limitation be by any means soever out of the case, the subsequent limitation shall take effect. Fearne, 163, 400; Doug., 505, note to *Doe* v. *Fonnereau*. And Lord Harwicke said that he knew *no* case to the contrary. *Avelyn* v. *Ward*, 1 Ves., 420. If, then, this be a remainder, it is still the same thing. "*Then*," "*when*," are adverbs of *time*, shewing the period at which the limitation takes effect, and not conditions. Boraston's case, 3 Rep., 19; *Taylor* v. *Taylor*, 1 Atk., 386.

It could not be the intention of the testator that John Stephenson should have the estate if a child was born and died, and that he should not have it if none was born; for

1st. The *sex* seems to be in the anxious contemplation of the testator, and he repeats the phrase "if a male" several times.

2d. He gives the *whole* to William, to go over, *unless a male*,

and upon the death of *both sons*, he provides for his daughter *Polly*, who was then living, *only for life*, out of the rents of a part of the land, and limits the remainder thereof *to her issue*, remainder to the *sons* of his sister *Wyatt* by name; so that it appears to have been his purpose to *prefer* his *nephew of his own name*, and before his daughter *Polly*; and why not before an *unborn danghter?* He seems to favor the males throughout.

3d. It is equally clear that he did not intend the whole to go to William *absolutely*, and not go over, unless another *son* should be born, because that would be making the birth of a *second daughter* disinherit the *first* daughter, and *leave both unprovided for*. It is obvious that he intended the estate should go over *at all events*, whenever the preceding
(290) estate to the *son* or *sons* (if two) should fail.

The will, therefore, should be read, "if the child, of which my wife is pregnant, be a *male*, I give to him, etc.; but if no child be born, or if born it be a *female*, or being a male, die without issue living at his death, then I give, etc."

*Gaston*, for the defendant. — I. The devise to William Stephenson was absolute and indefeasible, except on one contingency which has never happened, the birth of another son. There is no ambiguity in the devise to William: it is a devise of all, with a life estate in part to his wife, and a declaration that if he should have another son, this part on the death of the wife should go to that son. Under this clause, he takes a fee simple, defeasible on that condition *only*. The clause relative to William's death is connected with the same contingency, "if the child be a male." To annex any other modification to William's estate, when such a contingency has not happened, is to counteract the plain language of the will.

There is no reason to conjecture that in this case, the modification of the devise to William by the contingency of the birth of a female child, would have been agreeable to the testator. He wishes in case of two sons and one daughter, and the two sons dying without issue, this only daughter to have half of the land, and a nephew the other half; but suppose one son and two daughters, as was the fact, and the one son dying without issue, did he wish one daughter to take half and the other *none?* The nephew, in case there was but one daughter to provide for, might take a child's

share; but if there were two, was one to be disinherited to make room for him? Courts will not strain after a meaning not expressed, to disinherit the testator's child. Fearne, 420, 425, 454.

The supposition of the intent is repelled by the consideration, that he had distinctly before him, and made provision, with respect to the personal property, for the contin-
(291) gency of such child being a female—"to go to such child whether male or female," and then limiting the real estate distinctly upon the other contingency, "if a male."

The claim of the Plaintiff is equally unwarranted by the words of the testator, and by any intent which we can fairly presume him to have entertained. The cases relied on by the Plaintiff to establish his rule of construction, only shew this principle, that where devises follow each other, and one is affected by a contingency restricted to itself alone, the ulterior devise, whether remainder or executory limitation, shall take effect when the former fails, in the same manner as though it had not failed, but been determined by the contingency—(See 1 *Fearne*, 355, *et seq.* 362-3-4; 2 *Ibid*, 400, *et seq.*) In the cases quoted, the failure of the preceding estate of the first limitation, being tantamount to its regular determination, the subsequent limitation takes place. But here the first limitation takes effect, is not determined, has not failed. In them the contingency was to terminate the preceding estate, and it was removed without it; but in this case the contingency is to terminate the first and raise the ulterior estate, and the contingency never happens—*Miller* v. *Faure*, (1 Ves., 85—*Holmes* v. *Cradock*, (3 Ves., jr., 320; *Doe* v. *Shipperd*, (Doug., 79)—*Doe* v. *Brabant*, (3 Bro., 393); *Sheffield* v. *Orrery*, (3 Atk., 283.)

II. The limitation under which Plaintiff claims is too remote to be supported as an executory devise. There are no *distinct expressions* to tie up the meaning of the words "dying without issue; and though it be admitted that by the decision in *Jones* v. *Heirs of Spaight*, it is settled, that since the act of 1784 abolishing estates tail, the same construction shall be put on devises of real, as on bequests of personal property; it is yet the settled law in such bequests, that if the words of bequest would have given an estate tail in lands, they carry an absolute estate to the legatee, unless there be

found in the will some *distinct expression* to tie up the
(292) legal meaning of the words.

But in restriction of the legal import of the words used here, it is said that the first words, "if either die without issue, the *survivor* to have the whole," shew, that by *issue* is here meant, issue living at the death of one in the lifetime of the other. The authorities will not support this position; *Butler's Fearne*, 358—2 Roper, 297. See *Sutton and wife* v. *Wood*, (Conf. Rep., 202.) But because the word *survivor* here used qualifies the preceding words "die without issue," it does not follow that these used in a *subsequent* devise lose their proper meaning when there is nothing to restrict them—(1 Ves., jr., 286—9 East, 272) Besides, the whole argument of the Plaintiff is founded on the assumption, that as a second male child was not born, all the provisions of the will having reference to such an event may be thrown aside out of view; yet these provisions are now to be viewed in order to *change* the meaning of subsequent ones. But it is alleged that there is a limitation over of a life estate as to part, and this shews that the event was of course not to happen in the life of the devisee. If there were no other limitations over than that for life, there would be apparent reason in this argument. The testator could not have contemplated *this* ulterior estate taking effect other than in the life of the devisee, then this duration of the ulterior estate would restrict the preceding general words; but when a life estate is given as to part only, and a fee simple as to another part, and fees are given in remainder after the termination of the life estate, the general words remain perfectly unrestricted, at all events when the enquiry is as to the vesting of estates other than the life estate. The limitation here can be supported only on the supposition that the testator has said that John Stephenson's estate shall depend on the contingency of his son's dying without issue, *living his daughter*. Has he said so, is here the enquiry. There is an absurdity in making
John's right to enjoy depend on Polly's being alive.
(293) If she is dead the nephew shall *not* take, and *her* children shall not take if their mother die before her brothers!

But such an inference is not raised, for the devise to Polly is not for life. A devise of the profits of the land for life or forever is a devise of the land—(Com. Dig. "Devise N. 1." —1 Ves., 171—2 Salk., 679—Cro. Jac., 104)—and the rule in

Shelley's case unites the two limitations in the first taker, and makes it a fee.

To support Plaintiff's construction, it will be necessary to insert an entirely new limitation, "or in case the child with which my wife is pregnant should not be born, or should be a female, and my said son should die without lawful issue," &c. Such a limitation cannot be supplied, for Courts cannot add to a will, nor supply its omissions on conjectures, although founded on the highest probability—(3 Burr., 1634—2 Eq. Ca. Ab., 361—12 Mod., 128—Doug., 75—4 Term Rep., 706—2 Fearne, 412)

TAYLOR, Chief-Justice.—The substance of Thomas Stephenson's will is a devise to his son William in fee, a devise to his wife for life, of part of the land, and taking notice that his wife is *ensient*, a devise of that part to the child, if it should be a son, with cross remainders to him and William. In the event of the death of both without issue, he devises part to his nephew John Stephenson, in fee, and part to his daughter Polly. William the son, and Polly the daughter, are both dead, without issue. The testator's wife was pregnant; but instead of a son, she was delivered of a daughter, who is the only remaining child of the testator, and is heir-at-law to William and Polly. This ejectment is brought by the nephew John, against the posthumous daughter, and the question is, whether the limitation over to John can take effect, inasmuch as the contingency, viz. the birth and subsequent death of a son, upon which it was made, never happened. The effect of a construction of the will ac-
(294) cording to its words, and, as I think, the apparent intent, will give to the testator's only child the land in controversy. An opposite construction will, according to all appearance, disinherit this child in favor of a nephew—a child for whom it was impossible the testator could cherish other feelings, than those of parental tenderness, and the purity of whose lineage he asserts, by the provision made for the eventual birth of a son.

It is not within the range of probability that a man, knowing his wife to be pregnant, should deliberately make an ample provision for a child, if a son, and *intend* at the same time, that it should be wholly unprovided for, if a daughter; but it is probable that he omitted to provide for a daughter, only because tuch an event did not present itself to his con-

templation, and that his mind was diverted from it by arranging the limitations over in the event of the birth of one son, and the death of both without issue.

The testator, when he made his will, had a son and a daughter to provide for; and confining his views exclusively to the chance of having another son, he prefers the interest of these two to that of his daughter Polly; but if both his sons should die without issue, he, under the supposition that he should then have but one daughter, which must have been so, unless his wife had twins, calls in his nephew John to share the land with her. In such a state of things, he might probably think there was enough for both. But had he forseen that, instead of two sons and a daughter, he would have a son and two daughters, it may be conjectured, that though he might postpone them to William, he would, at least, have placed them on an equality with each other. It has been argued, on the part of the nephew, that where a devise is made after a preceding executory limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation never should (295) arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to the subsequent limitations.

That words of condition have been construed as limitations instead of contingencies, appears from many cases cited for the plaintiff, and from none more distinctly than *Jones* v. *Westcombe*, in Eq. Ca. Ab. and *Strathan* v. *Bell*, in Cowp. Rep.; the first of which is a leading case, which has been cited in almost every subsequent one. In that case, the intention could not be doubted, that, failing the child, the estate should go over to the devisees, in all events. They were the next objects of the testator's bounty, and there were no children to be provided for. In the other case, the testator had a wife and a daughter, and he devised to a son, of which he supposed his wife to be *ensient* at the time of making his will, when he should attain his age of twenty-one years; but if a daughter, then one moiety of his estate to his wife, and the other moiety to his two daughters (there being one alive at the time) when they should attain their ages of twenty-one, with survivorship as between the daughters; if both die before twenty-one, their moiety to go to the wife, and her heirs forever; if she died, her share to go to them. The wife

proved not to have been *ensient;* the testator died, and so did the daughter, without issue and under age. It was held that the wife should take the whole estate.

In the last case there were no children, and the words were construed as a limitation to carry the estate to the wife, rather than as a condition, which would perhaps have given it to a distant heir-at-law. The construction was evidently made to support the intent; and although I will not say that words have in every case been construed as a limitation or condition for the sake of supporting the intent, yet in the only cases I can find, where children have been born after making the will, who were not provided for, or prob-
(296) ably thought of, when the will was made, such a construction has been made of the words, either to construe them as limitations or precedent conditions, as would most effectually guard the interest of the after-born children.

The case of *White* v. *Barber*, is a very strong instance, to shew how far a Court will go towards effectuating the intention, even by supplying words for that purpose. There the devise was to such child or children as the testator's wife should happen to be *ensient* with, at the time of his death. The testator had only one son at the time of making the will; two were born after the will was made and before his death, but his wife was not *ensient* at the time of his decease; yet the Court held that it was manifestly the intention of the testator, to comprehend all the children which should be born of his then wife, whether before or after his decease; the Court thinking, that a father, in making an express provision for any children his wife should be *ensient* with at the time of his decease, could never intend to give his estate to such children in exclusion of, or to his nephew (as the event has happened) in preference to, any child or children that might be born in his life-time—(5 Burr., 2703.) In another case, words have been construed as a condition precedent, rather than a term should go to a devisee, a grandson, where there was a daughter born after making the will. There a term was devised to an infant in *ventre sa mere*, if it should be a son; and if it should be a son and die under age, then to the testator's grandson. It proved a daughter, and it was adjudged upon special verdict, that the executrix, and not the grandson, should have the term, because the grandson was not to take, but upon a precedent condition, viz. the bith of a son, which did not happen—*Grascott* v. *Warren*, (2

Eq. Ca. Ab., 361.) If the position I have advanced needed further confirmation, it will receive it from *Doe* v. *Shippard*, (Douglas, 75.) There the words were, "And in case
(297) my said daughter Rachael shall happen to survive the said Thomas Shippard, her husband, then upon trust," &c., after which follow the limitations over after the daughter's death. It happened in event, that the husband survived his wife, and it was held that the limitations over did not take effect, the contingency affecting all the limitations, and operating as a condition precedent.

The case was argued and decided on the ground of intention, to support which, the words were construed a precedent condition; and with the same object in view, the words in *Jones* v. *Westcombe* were construed a limitation. A Court may supply the omission of express words, if they can discover a plain intent, otherwise they cannot. And although it ought always to be considered what a testator meant to do, as well as what he actually has done, and we are not at liberty to decide according to what he probably might have done, had a different view of events presented itself to his mind, yet the title of the heir must prevail against more conjectures.

It is upon this principle I think, that the contingency upon which the testator designed his nephew John to take the estate, has never happened: that the fee devised to William, the son, was never displaced or modified, because a son was not born; and that upon William's death without issue, it descended upon his heir at law. My opinion therefore is, that judgment be rendered for the Defendant.

HENDERSON, Judge.—I am now satisfied that when this case was here before, *vide* 3 Murph. Rep. 558, the facts then stated were sufficient for a proper decision, and that it was quite immaterial whether the daughter Polly died during the life of William or not; the life estate given to her being a circumstance relied on to tie up the general words, dying without issue.
(298) On the question now presented, I am of opinion in the event which has happened, that Stephenson, the lessor of the Plaintiff, takes nothing in the lands in question; for a precedent estate becomes a precedent condition, or not to an ulterior limitation, according to the intent. Thus if an estate is devised to A. and his issue, and if he

should die without issue, then to B, and A. should die leaving issue in the life time of the devisor, whereby the estate never vested in A. or his issue, B. would take, although A. left issue; for by whatever means A's estate was out of the way, whether by commencing and expiring, or by not commencing at all, and whether he left issue or not, if that issue could not take, B, by the plain intent, shall take; for the postulatum is, is the estate *out of the way*? and not *how it became* out of the way. So, if a man devise his land to the child with which his wife is pregnant, and if that child should die without issue, then to B, and no child should be born, his wife not being pregnant, B. would take. In each of these cases, the words give way to the intent, there being nothing to control it. But put this case, a man having no child, devises that if his wife should be delivered of a daughter, (the wife being pregnant) that his daughter should have his estate during her life, and after her decease to go to his nephew, and a son is born. The words here do not give the estate to the nephew; he is only to have it *after the death* of the daughter, and there was no daughter *to die*. The Court in this case will make the estate to the daughter a condition precedent, that is, they will not vary the natural meaning of the words to carry the estate to the nephew, and leave the son totally unprovided for. We do not want authorities or precedents for this, for they are to be found running through all the cases, either openly avowed, or occultly governing the decision; and were there artificial rules intended to aid in establishing the intent (for at last it is nothing but a question of intention) which would lead to a different (299) result, it would become us to examine them well, and be assured that the rules were genuine, and that we understood their proper application. Let the principles governing the cases before stated be applied to the one before us: Suppose no child had been born, the intent then would have justified a departure from the words, and carried the estate to Stephenson; for upon the death of William, without issue, there would be no child but was provided for in the manner the testator designed. Polly, his only surviving child, would divide with the nephew as the testator intended. But a daughter is born, and we are called on to put a construction on the words different from that which they naturally bear, to aid a nephew and leave a child entirely destitute, a child who never had offended, and which the

testator recognized as his, by directing that should it be a son, he should divide the lands with William. I am aware that if the limitation to Stephenson is not sustained, the one to Polly must fall; be it so—it is better that the lands should remain in William, in fee simple, and descend to his heirs, and Polly be deprived of her limitation, than that Stephenson should take, and a daughter be excluded by constructions only. There are no sufficient grounds afforded to vary the words of the will, and on the will rests the plaintiff's title. Were I to hazard a conjecture why no further disposition was made by the devisor in case a daughter should be born and not a son, I would say, that having by the first part of the will given the whole of his lands to William, which were to be divested only by the birth of a son, the ulterior limitations were all bottomed on that event, and if a son was born he did not expect a daughter also at the same birth; if a son was born, which excluded a daughter, he was willing that, on failure of his male descendants, his nephew should share with his daughter Polly, for in that view of the case, there could be but one of his issue to take.

(300) But the strong basis of the decision is, that the claims of the after-born daughter are stronger than the claims of the nephew, and we will not vary the common meaning of the words to let in the claims of the nephew, and thereby leave the daughter entirely destitute. In other words, the devisor has, by the *very language* of the will, made the birth of a son a condition precedent, and there is no evidence of intent for the Court to dispense with the performance of the condition; indeed, the birth of a daughter furnishes evidence the other way. I think that the defendant is entitled to judgment.

HALL, Judge.—I concur in the opinion delivered by Judge Henderson. The great and important object is to ascertain the intention of the testator. Agreeable to the letter of the will, the Plaintiff is not entitled, because the testator only gives it to him after the death of his son William and the death of the child which his wife was then pregnant with, if a male, without lawful issue; it must be a male, and must die without issue, to give him a title. Now I agree that Courts will put such a construction on wills as to support limitations over, where particular estates are by any means put out of the way, as the Plaintiff's counsel have contended. Yet

they ought not to do it, against the letter and words of the will, when the consequence will be to leave a child altogether unprovided for: they ought to lean to support such limitations over, when they think from every circumstance that the persons taking under them are the next objects of the testator's bounty, after the persons to whom the particular estate was given. But in this case I cannot agree to support the limitation over for the benefit of a nephew, and that too against the words of the will at the expense of a child who would be left altogether without the means of support, by a father, bound by all the ties of nature to make provision for her.

Nor can I think that such could have been the wish
(301) of the testator.—(*White and others* v. *Barber*, 5 Burr. 2703—2 Fearne, 5th Ed. 410, *in notis.*)

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JAMES WHITE *v.* MORRIS.

*From Craven.*

Wherever an injury is done to goods in the actual possession of a servant, carrier, or bailee, if the owner have the immediate right of possession, he may sue for such injury in his own name.

Therefore, where A. loaned a horse to B. during the will of A., and the horse was seized by virtue of an execution against B., A. may maintain trespass against the officer refusing to deliver him up.

This was an action of *trespass vi et armis*, brought by the Plaintiff against the Defendant, for taking and carrying away the horse of the Plaintiff. It was found by the special verdict, on the trial below, that the title to the horse was in the Plaintiff, but that he had loaned him to his brother, Paul White, to work during the pleasure of the Plaintiff. While the horse was in the possession of Paul White, and employed in carrying provisions to market for him, the Defendant, a Constable, seized the horse and took him into possession, by virtue of an execution against Paul White. The Defendant refused to deliver the horse to the Plaintiff, who claimed the same, and afterwards sold him to satisfy the execution. If under these circumstances the Plaintiff could maintain *trespass*, then the Jury found for the plaintiff. The Court held that trespass could not be supported, and on motion rendered judgment of *nonsuit*, whereupon Plaintiff appealed.

*Gaston* for Plaintiff.—The general property in a chattel draws to it the possession thereof in Law, so as to maintain

an action of trespass, though it has never been accompanied with actual possession—Bacon, "Trespass C. 2," pl. 9
(302) Bro. "Trespass," pl. 303, pl. 306—Lach. 214—Bulst. 268.

This general property will support trespass, though the chattel, when taken, were in the actual possesion of a bailee, who had a *special property therein*—Bacon *ut supra* pl. 16—2 Roll. Abr. 569 P. pl. 5 Sid. 438.

If the goods of J. S be bailed to J. N, and be taken from or injured in the hands of J. N. by a stranger, J. S. may maintain trespass—Bac. *ut supra* pl. 17—2 Rol. Abr. *ut supra.*

Not only he who has the property, but also he who has the possession of goods, shall maintain trespass; as if a man has cattle to *agist*, he shall have trespass against him who takes them—Com. Dig. "Trespass B. 4."

If trespass be done to goods in the hands of a bailee, trespass lies by bailee—2 Roll. 557, 631—and also by bailor, and he who first recovers shall have the damage—Com. Dig. *ut sup.* 578—2 Roll. 569, 622.

It seems to have been thought that there was a difference between the possessory right necessary to maintain *trespass* and *trover*, and Lord Kenyon once so decided in *Ward* v. *M'Cauley*, 4 Term 489. The distinction is unfounded—See Saund. 47 a. *et seq.*

The doctrine as laid down by Chitty, would at first view seem to uphold this distinction, but on examination, it will not. All that Chitty means, is, that a *reversionary* proprietary interest, while a certain *fixed right* of immediate ownership is in another, will not draw to it the possession in law, and maintain trespass or trover—Chit Pl. 48, 49, 150, 151. He cites *Ward* v. *M' Cauley*, *Gordon* v. *Harper*, 7 Term. Rep. 11, and *Biddingfield* v. *Onslow*, 3 Lev. 209. *Gordon* v. *Harper* alone supports him, and this case may be questioned—*Kennedy* v. *Waller*, 2 Hen. & Mun. 415. As to the others, they shew that a reversionary interest after a *term* will not support trespass, and they also indicate that the possession of a mere *tenant at will* is no bar to the action.

The law as respects real property, is more exact in
(303) requiring possession to maintain trespass, than in regard to personal estate; yet even in real property, in a case like this, the owner might have trespass—(Com. Dig. "Trespass B. 2"—2 Roll. 551.) *Starr* v. *Jackson*, (11 Mass. Rep. 519.)

TAYLOR, Chief Justice, delivered the opinion of the Court:

The plaintiff, notwithstanding the loan to his brother, had a constructive possession of the horse when the trespass was committed; and had a right to the immediate actual possession, if he thought proper to exercise it. This makes the distinction between the cases; in *Ward* v. *M'Cauley*, it was held that the landlord, who had leased the goods for a certain time, could not maintain an action of trespass against the Sheriff for seizing them, because he had parted with the right of possession during the term, and had only a reversionary interest. But whenever the injury is done while the goods are in the actual possession of a servant, carrier, or other bailee, if the owner have the immediate right of possession, the action may be brought in his name. The same principle applies to real property, for if a stranger does a trespass to a lessee at will, which prejudices the land, the lessor may have trespass against him for damage to the land; for the possession of the lessee is his possession—(Comyns "Trespass B. 1.") The very case before us is put in the books, to shew that the owner has the right of present possession. So if a man lend his cattle to J. S. to plough his land, and a stranger takes them away, J. S. may maintain trover or trespass against him—(Bro. "Trespass 90.") The case of *Carson* v. *Noblet* was decided on the same distinction, and is directly in point with the one now before us. That was the case of a loan resumable at pleasure, in which trespass was held to lie by the owner, for a taking from the actual possession of the bailee—(1 Law Rep., 522.) The nonsuit must there-
(304) fore be set aside, and judgment entered up on the the verdict, in favor of the plaintiff.

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Executors of WALKER *v.* M. CAMPBELL, Executor of W. Campbell, and GREEN, Administrator *cum. test. ann.* of Orme.

*From New Hanover.*

A debt barred by the statute of limitations is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, *after paying my debts*, they," &c.

This was an action brought on a negotiable promissory note, made by William Giles, dated April 16th, 1812, payable to W. Campbell, sixty days after date. The note became

the property of plaintiff's testator, after having been indorsed by the payee and by Orme. Payment was regularly demanded, and the note protested for non-payment; due notice was also given to the indorsers, Campbell and Orme. The defendants severally pleaded that the cause of action did not accrue within three years; to which proper replications were made, and the only question was, whether the action should be barred by the statute of limitations.

No further evidence was offered on the trial to shew the liability of Campbell's executor; but the will of Orme was introduced, to prove a revival of the remedy against him, and to shew that the action as to him was not barred by the statute. Orme died in the month of July, 1818, having first duly made his last will and testament, bearing date the 20th of June, 1818, which contains the following clause, viz. "I will and direct that my executors hereinafter named, sell all my negro slaves, except Katy, and Maria, and her child, and upon such credit as they may deem advisable, and that with the proceeds thereof, *after paying my debts*, that they redeem my bank stock, or such amount thereof as the (305) said proceeds may enable them." The will was regularly admitted to probate, and the executors therein named duly renounced the execution of said will, and administration with the will annexed was granted to the defendant, Green. The writ in this case was issued February 2d, 1820. The jury found that the testator of the defendant, M. Campbell, did not assume within three years; and they further found that the testator of the defendant, Green, did did assume within three years. On the part of the defendant, Green, a motion was made for a new trial, which was refused, and judgment was rendered in pursuance of the verdict, whereupon Green appealed.

TAYLOR, Chief-Justice.—As the date of Orme's endorsement is not specified, it must be understood to have been made on the same day with the note, viz., 16th April, 1812. The note became due the 16th of June of the same year, when the statute began to run and had taken away the remedy in 1815, three years before the death of Orme. His will directs his executors to sell certain negroes, and with the proceeds to redeem his bank stock *after paying his debts;* and the enquiry is, whether this debt is revived by such a direction. I consider the law to be clear, that the debt is

not thereby revived, but that the remedy is entirely gone. The utmost extent to which any of the cases have gone, has made debts payable only, when lands have been devised in trust for that purpose; and as lands in England are not liable for simple contract debts when they are made chargeable with all debts, the executors who are directed to pay them, are made trustees for that purpose. It is there appropriating a fund for the payment of debts, which is not liable by law; but it may well be doubted whether such a doctrine, if well established by the authorities, would be applicable here, where lands are liable to the payment of all debts, after the personalty is exhausted. In this State, as well as in England, the personal estate is the primary and natural

(306) fund for the payment of debts, a fund which the testator cannot exempt as against a creditor, though he may against the devisee of the land, by making that a fund for the payment of his debts. I should not hesitate to conclude that a bequest of personal estate in trust to pay debts, would not revive a debt barred by the statute, for the reason given in 3 P. Wms., 90 *in notis;* and in this State the same result would follow in relation to a bequest and devise of personal and real estate. But the only question now to be decided, relates to a bequest of chattels, and it will therefore be sufficient for the purposes of this case to shew, that in all the authorities relied upon to establish the general position, the trust was created of lands. The anonymous case in 1 Hayw., 243, does not state what species of property was devised, and the cases it refers to in 1 Salk., 154; 2 Vern., 141; and 2 P Wms., 373, are all cases of the devises of lands. In the last case from P. Williams, of *Blakeway* v. *Ld. Stafford*, the statute of limitations was pleaded to a bill, to have the benefit of a devise in trust for the payment of debts, and the plea was overruled; but this decree was reversed in the House of Lords, who ordered the plea to stand for an answer (3 Bro. P. C., 305). There is a *dictum* of Lord Mansfield (in Cowp., 548), very much in favor of the doctrine contended for by the plaintiff, but there is reason to believe that it is very far from being settled. For when the case from 2 P. Williams was cited in proof of the position insisted on, the Chancellor of Ireland doubted if there was such a determination as is there reported; and stated that a devise in trust for the payment of debts, does not prevent the setting up the statute, if it had run before the

death of the testator; for if the statute has run in the lifetime of the testator, the debts are presumed to be paid (1 Scho. and Lef., 110). The case before us, however, is not a devise in trust for the payment of debts, but simply a direction to the executors what they are to do with the pro-
(307) ceeds of the surplus of slaves after the debts are paid. The will has declared in relation to the debts, what the law would have said without it, that they must be paid out of the personalty in the first place. The judgment must consequently be reversed, and a new trial granted.

HALL and HENDERSON, Judges, concurred.

## PALMER *v.* POPELSTON.

*From Martin.*

**Under the act of 1792, a sheriff's bill of sale for a slave is like the bill of sale of any other person; and when the purchaser takes the actual possession of the slave, the conveyance must be recorded in the county where such purchaser resides.**

*Detinue* for two negro slaves. The plaintiff in support of his title, proved by the subscribing witness, a bill of sale from the Sheriff of Washington county, for the slaves in suit. At the time of the execution and registration of this bill of sale, the vendee lived in *Martin* county; the bill of sale had been registered in *Washington* county. It was objected by defendant, that as the paper produced, had not been registered in the county in which the vendee lived, it could not be read in evidence, and the Court sustained the objection. The plaintiff then submitted to a nonsuit, and made a motion for a new trial, grounding his application on an affidavit stating that the bill of sale had been recorded in the county in which the vendor, and the individual against whom the process under which the slaves were sold, had issued, both lived. That he was ignorant of the laws relative to registration, and supposed in this case the bill of sale had been regularly and properly recorded, particularly as he had submitted it to counsel, and had recovered
(308) another negro by a former suit, on the trial of which, this bill of sale was read in evidence without objection. The motion for a new trial was refused, and judgment rendered against the plaintiff for costs, whereupon he appealed.

*Gaston*, for appellant.—The act of 1784 requires sales of slaves to be in writing and recorded. The act of 1789 prescribes the *time* of recording, but neither points out the place of registration. The act of 1792 points out the place, but it is believed does not apply to a judicial sale. The 2d section applies only to the case of a private contract of sale where the *vendor* might retain possession under special agreement, and cannot apply to the Sheriff, who, *as such*, can retain no possession at all. The policy of the law requires *judicial* sales to be rendered notorious in the places where the sale takes place, and consequently that the registration ought to be where the sale is made. A sale made before the *Master* is not within the stat. of frauds—(Sug. Ven., 78).

*Drew, contra.*—The *words* of the act embrace this case, a *sheriff's* sale and conveyance is still a sale and conveyance. The policy of the act requires that the bill of sale should appear of record in the county where the possession is, to prevent fraud. A sale before the Master, is supported by the Court, because it is the *act* of the Court.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The act of 1792 requires all written transfers or conveyances of slaves to be registered in the county where the purchaser resides, provided he be in the actual possession of the slave. It makes no distinction between a Sheriff's bill of sale and any other; and therefore, where the title is set up under such an one, there can be no doubt that the
(309) requisites of the law must be complied with. Hence the nonsuit was properly awarded: but as the objection was not taken on the former trial, the plaintiff was surprised by it. The justice of the case, therefore, renders it fit that a new trial should be awarded, and this is done upon payment of the costs of this and the Superior Court.

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SNEED *v.* CREATH.

*From Granville.*

Under the act of 1796, a Judge may say to a jury, that a particular fact is *proved*, if the jury believes the witness deposing to such fact. If a witness is proved to be a minister of the gospel, that fact may with propriety be mentioned to a jury; but it does not *necessarily*, entitle his testimony to more weight, than that of another man.

SNEED *v.* CREATH.

This was an action of debt brought on a bond made payable to Sam'l Creath, for 25*l.* of the currency of Virginia, executed by the defendant on the 9th of March, 1808, and on the 23d of September, 1818, indorsed by the executrix of the original obligee to the plaintiff. The defendant pleaded payment, and to support the defence, introduced as a witness, his brother William Creath, a minister of the gospel, who deposed that 16 or 17 years before, the obligee of the bond now in suit, informed the witness that a final settlement of accounts had taken place between himself (the obligee) and the obligor, and shewed him the bond on which this action is founded, and also a deed of trust for a certain horse, to secure the payment of the bond; the witness also stated that he was informed by the obligee that this bond was founded *in part* upon a judgment obtained in Court, in favor of his mother. This witness also stated that the obligee had afterwards informed him, he had received partial payments on the bond, and that in 1810, the witness was present at the house of the obligee, together with the (310) defendant, when a final settlement took place; the bond now sued on was produced and fully satisfied, and the witness wrote a receipt in full against it, which the obligor signed and the witness attested, and that he left all the papers on the table.

The executrix of the obligee was introduced by the Defendant, to prove declarations by the obligee, admitting payment of the bond. She stated that some short time before the death of the obligee, he caused her to get this bond, with the view of sending it to the obligor for payment; but that he declined afterwards sending it, and directed her to put it away, which she did, and after his death was not able to find it, until a short time before she indorsed it to the Plaintiff. While it was lost, as the witness supposed, she applied to the Defendant for payment, and was asked by him where the bond was? She answered, it was mislaid; and Defendant assured her he would not, in consequence of that circumstance, withhold any thing from her or her's. This witness was present at the settlement spoken of by William Creath, and though not particularly attentive, understood it to be a settlement of accounts and transactions different from those of which he spoke. Further, she stated that she, at the time, thought the witness, Creath, was intoxicated; that she understood the bond in question was given, in consequence of

the Defendant's having sold a horse, which the obligee owned. William Creath was then called again to explain his situation at the time of the settlement, when he stated that he was perfectly sober, and explained the circumstances and acts which had induced the belief in the last witness of his intoxication.

The Plaintiff then produced the record of the judgment spoken of by Creath, as being part of the consideration of the bond. The suit was in the name of Susannah Creath; but the bond had been transferred to Samuel Creath, who, as agent for Susannah, managed the suit. The judg-
(311) ment had been obtained in the month of May *after* the date of the bond, on a bond in the penalty of 50*l.* currency of Virginia, conditioned for the payment of 25*l.* of the same currency, and the execution appeared to have regularly issued until February, 1809, when it was returned, "stayed by order of Plaintiff's agent, Samuel Creath, according to the order filed." A witness was then introduced, who proved the drawing of a bond by Wynne, (the subscribing witness to the bond in suit,) for the sum of 25*l.* currency of Virginia, which he understood from all parties, was in some way connected with a transaction relative to a horse. The bond sued on was in the hand-writing of Wynne, and appeared to have been written and executed at the same time.

The Judge, in his charge to the Jury, stated that the evidence of William Creath, if believed, proved a settlement of the bond on which the action was brought, that it was given in consideration of a bond in which Samuel was interested, made by John, the Defendant, payable to Susannah Creath, the mother of the witness, the Defendant, and Samuel, for the penalty of 50*l.* conditioned for the payment of 25*l.* That it did not appear that the witness William had any inducement to commit a perjury; that standing in the situation of a relation to the Defendant, to Samuel the obligee, and to the individual who transferred the bond to the Plaintiff, they ought in charity to believe the witness. That there was nothing to impeach his testimony, and being a preacher, it ought to add weight to his evidence. If the Jury believed the testimony of the witness William, they should find for the Defendant.

The Jury found a verdict for the Defendant: a motion was made for a new trial, which was refused, and judgment

rendered pursuant to verdict, from which the Plaintiff appealed.

(312) TAYLOR, Chief-Justice.—A Judge cannot, under the restraint imposed by the act of 1796, give an opinion in charging the Jury, whether a fact is fully or sufficiently proved; "such matter," in the language of the act, "being the true office and province of the Jury;" and if the charge in this case had simply stated that the settlement was proved by the witness, it would have been in conflict with the law; when, however, it proceeds to state, that the settlement is proved *if the Jury believe the witness*, it explains the sense in which the word *proved* is used as synonimous with *evidenced*, in which latter sense it would probably be understood by the Jury, who would then feel themselves at liberty to estimate the weight of the evidence. It were to scan the instruction with too critical an exactness, to award a new trial on this ground.

As to the other point: The profession of a preacher does not necessarily invest a man with that purity of morals which renders him more scrupulous in declaring the truth than another man; for it sometimes happens, that even the members of that sacred vocation are overpowered by the temptations to vice. That a witness is a preacher, ought, if proved, to be stated to the Jury, that they may judge how far that circumstance entitles his testimony to additional weight; but even then a Jury would draw their conclusions from his individual character, and its correspondence with his profession, rather than from the profession itself. The instruction given in this case can only be sanctioned by assuming the position, that a preacher *ex vi termini*, denotes a person whose evidence is entitled to greater weight than that of another man: whereas, a preacher whose life and profession are at variance, is less entitled to confidence than another man, since to his other vices he adds that of hypocrisy; and he who could impiously aim to deceive the Deity, would not scruple to mislead his creatures. On this part of the (313) charge, therefore, a new trial must be awaaded.

HALL and HENDERSON, Judges, concurred.

## LOVE *v.* WALL.

*From Anson.*

**If two individuals indorse a note in virtue of a mutual understanding with each other, to lend their names for the accommodation of the maker, evidence may be left to a Jury of such mutual understanding or agreement.**

This was an action brought to recover the amount of a promissory note made by Edward G. Williams, negotiable and payable at the Bank of Cape-Fear, in Fayetteville. The note was made payable to and endorsed by the Defendant, and afterwards by the Plaintiff; both these indorsements were made for the accommodation of the maker, who procured the note to be discounted at Bank, and applied the proceeds to his own use. When the note arrived at maturity, it was regularly demanded at the Bank, protested, and due notice given to the Defendant and Plaintiff. The Plaintiff being sued by the Bank, paid the amount of the note, and brought this action against the Defendant, as first endorser. On the trial below, the Defendant contended that both the Plaintiff and himself were to be viewed as joint securities of Williams, having both indorsed for his accommodation, and that the Plaintiff was therefore only entitled to recover one-half of the note. The Court instructed the Jury, that there appearing no evidence of any special agreement between the parties, this case was to be regulated by the Law Merchant; and that the Defendant, being the first indorser, was liable to any subsequent indorser who was a *bona fide* holder (314) of it, or who had been compelled to pay the note to a *bona fide* holder; whereupon the Jury returned a verdict for the full amount of the note. A new trial was moved for, on the ground of misdirection of the Court, which was refused, and from the judgment rendered pursuant to the verdict, Defendant appealed.

*Gaston*, for Plaintiff.—When men attach their signatures to instruments, it must be considered they do so with all those liabilities imposed by law.

An endorsee has a right of action against all parties prior to himself. Chitty on Bills 155, 357, 4 Mass. R. 258, 3 Day 311. The only circumstance which can be supposed to take this case out of the general rule, is, that the note was made and indorsed for the *accommodation* of the maker. But that circumstance cannot vary the general rule as to the liability

of indorsers. Chitty 160, 7 Johns. 361. It is not necessary in this case, that the consideration should be beneficial to the Defendant, for a consideration arising from the payment of the note, extends to all the parties upon it. 5 Cranch, 49, 142.

HENDERSON, Judge, delivered the opinion of the Court:

It does not distinctly appear whether the Plaintiff indorsed the note, in virtue of a mutual understanding with the Defendant, to become bound or lend their names for the accommodation of Williams; or whether after the note was made by Williams, and indorsed by the Defendant for William's accommodation, the Plaintiff, without any previous agreement with the Defendant to that effect, to give the note additional credit for the accommodation of Williams, also indorsed it. In the case first put, I think the evidence was to be left to a Jury of a mutual agreement to stand as joint securities, and there is certainly nothing in the form of (315) the writing which forbids the Defendant from shewing the special agreement, and on what consideration the parties respectively signed their names, or agreed to become bound. I therefore think the presiding Judge was wrong in requiring a special agreement of mutual liability to be proven in words. The Jury should have been instructed, that in law a mutual liability arose from a mutual agreement to become bound for accommodation, unexplained or uncontradicted by other circumstances. If the case be as put in the latter part of the foregoing statement, authorities may be found to show that a joint liability does not arise, which is as far as the cases relied on by the Plaintiff's counsel go. Chitty on Bills, 155, 357, 160, 7 Johns R. 361, 5 Cranch 49, 142; from which I am strongly inclined to believe, that the foregoing opinion is supported by authority, at least is not contradicted. We were without the aid of an argument for the Defendant, and although strongly inclined for the Plaintiff, if the case be as last stated, do not wish to express an opinion on it. But as from the statement it is doubtful how the facts are, and if as first stated, we think the law has not been administered, the judgment of the Court is, that there must be a new trial.

## DENBY *v.* HAIRSTON.

*From Rockingham.*

In a case of trespass to a man's possession, attended with circumstances of aggravation, such as wantonly exposing a crop to the incursions of cattle, this Court will not, on the ground of excessive damages, disturb a verdict giving the highest price at which the crop might have been sold.

*Trespass.*—The Plaintiff was one of the tenants of Gen. Izzard, on a large tract of land in the county of Rockingham. The landlord had given instructions to the (316) Plaintiff, as well as to his other tenants, to sow small grain, stating to them, that should he sell the land, he would reserve for them the privilege of reaping and securing the crop. The Plaintiff accordingly sowed a quantity of wheat and rye, in the fall of 1817; and in the month of January, 1818, Gen. Izzard contracted to sell the lands occupied by the Plaintiff, to the Defendant, but did not execute a conveyance until August of the same year. At the time of the contract, Izzard informed the Defendant that the Plaintiff was to have his crop of wheat and rye then growing, to which Defendant assented. In the month of March, 1818, the Defendant came to the land with his slaves, and entering on the premises against the will of the Plaintiff, tore down his fences, and exposed his fodder to his cattle; ploughed up his yard and sowed oats in it; ordered off the Plaintiff, and threatened him with the payment of five dollars rent per day while he remained. The Plaintiff at length consented to leave the place, provided he might be permitted at harvest time, to reap and carry away his crop. This the Defendant refused to permit; claimed the wheat and rye; and afterwards reaped and kept it.

The cause was tried before Daniel, Judge, in Rockingham Superior Court, at its spring sessions, 1818, and in its instructions to the Jury, the Court told them, that upon this evidence the Plaintiff was entitled to recover; and in assessing damages, they were permitted to give the *highest price* the wheat and rye were worth, and also the damages for the loss of the fodder, and for all other injuries which the Planitiff had sustained by reason of the trespass of the Defendant. The Jury found a verdict for the Plaintiff—damages $450.

A motion was made for a new trial on the ground of excessive damages, but was denied; and from the judgment rendered the Defendant appealed.

TAYLOR, Chief Justice.—Every principle of law and (317) every dictate of justice, combine to entitle the plaintiff to the full value of the wheat and rye taken by the defendant, and to compensation for the other injuries done by him No ground is perceived in which the verdict is exceptionable, for the defendant refused permission to the plaintiff to enter for the purpose of gathering in the crop when it should be ripe, but claimed it as his own, notwithstanding his assent to the plaintiff's right when told of it by Izzard; can it be doubted, therefore, that he is justly responsible for the full value of the crop? In addition to this, the defendant was a trespasser upon the plaintiff's possession, because when he entered, he had received no title from Izzard.

HALL, Judge.—I think there can be no ground for a new trial; the plaintiff was in possession of the premises under a parol lease from Izzard, prior to any contract entered into between Izzard and the defendant. When the defendant committed the trespass, the legal title to the land had not vested in him; he had by his contract a right to enter on the land, but the rights of the plaintiff were not thereby impaired; he had a right under his lease, to the property he had on the land, as well as to the growing crop. Let the rule for a new trial be discharged.

HENDERSON, Judge, concurred.

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(318) REYNOLDS *v.* PUTNEY'S Administrator.

*From Bertie.*

An administrator against whom a suit, originally commenced against his intestate, is revived by *sci. fa.* may confess judgment on a writ subsequently issued against him as administrator, and give in evidence the record of such judgment, in support of his plea of fully administered to the suit revived by *sci. fa.*

An administrator may retain assets to satisfy a debt due to himself on a note of his intestate, endorsed to him after the death of the intestate, but prior to the granting of administration.

This was an action of *debt*, originally brought against Putney, and after his death revived by *scire facias* against his administrator. The defendant, among other matters of defence, pleaded, fully administered, former judgments against

him, retainer, and no assets ultra; and in support of his pleas, produced a record of a judgment confessed by him, as administrator of Putney, in favour of one Cunningham, in the County Court of Bertie, on the second Monday of May 1820, on a writ bearing *teste* March 1820. The pleas were entered in the suit on trial, on the fourth day of the same term at which the judgment was confessed. The plaintiff's writ of *sci. fa.* was dated, and executed on the defendant on the 14th of February, 1820. In support of the plea of retainer, the defendant produced the obligation of Putney, payable to Joseph H. Bryan, and endorsed by said Bryan to the defendant; he proved the execution of this obligation by Putney, and that it was endorsed and delivered to him by Bryan, for valuable consideration, before administration granted, but after the death of his intestate.

The Court told the jury, that the administrator might confess a judgment in favour of Cunningham, and plead it in bar of the plaintiff, and that on the obligation of Putney, endorsed by Bryan, he had a right to retain. The jury found that the administrator of Putney had fully administered, and had no assets to satisfy the plaintiff's demand, or
(319) any part thereof. A new trial was refused, and judgment rendered for the defendant, whereupon plaintiff appealed.

PER CURIAM.—No error is perceived in the charge of the Court, as contained in the record, and a new trial is consequently refused.

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## WEAVER *v.* PARISH.

*From Orange.*

Where a magistrate who had rendered a judgment on a warrant, afterwards, at the request of an individual, signed the name of that individual in his absence as security for an appeal; it was held, that though the individual might have given authority to another to sign his name, yet that the magistrate was an unfit person for that purpose, as he thereby blended the characters of party and judge.

The defendant in this case was charged as the security on a judgment rendered by a magistrate in favour of the plaintiff, and on the trial it appeared from the testimony of the magistrate, that a few days after the judgment was rendered, he signed the name of the defendant as security, having

been requested by the defendant so to do, and witnessed it by his own signature as a magistrate. The Court was of opinion, that this signature was a signature by the defendant within the meaning of the law, and so instructed the jury, who returned a verdict against the defendant; judgment having been rendered thereon, plaintiff appealed.

TAYLOR, Chief-Justice. — The act of 1794 requires the acknowledgment of the security to be entered by the justice and signed by the party, but it was here entered and signed by the justice in the absence of the party. The act designed to make this an authentic document, equivalent to a confession of judgment, since execution issues upon (320) it without further notice. Whatever authority the party may communicate to another by a proper power, the justice is an unfit organ for its exercise, in thereby blending the two functions of party and judge. There must be a new trial.

HALL, Judge.—The act of 1794, ch. 13, sec. 1, declares, that when any defendant prays a stay of execution upon a judgment obtained before a justice, he shall, if required, give sufficient security, and the acknowledgment of such security entered by the justice, and *signed* by the party, shall be sufficient to bind him; the acknowledgment alone was not sufficient, and the justice had no right or authority to sign for him; it was his duty to take security, and if a third person had been directed to sign for the security, he must have had a written authority for that purpose. I think the rule for a new trial should be absolute.

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## TROTTER *v.* HOWARD.

*From Beaufort.*

Whether a deed be *fraudulent* or *bona fide*, is a question of *fact*, and possession, or the want of possession, is but *evidence* tending to establish the question one way or the other.

This was an action of *trover* for a negro girl. The plaintiff shewed title to the slave under a bill of sale from Thos. A. Cabarrus, executed in the town of Washington, on the 1st of June, 1818. This bill of sale represented the property as being, at the time of the conveyance, in the possession of

the widow of the vendor's brother, at Ocracoke. It appeared in evidence, that the plaintiff and Thomas A. Cabarrus lived in Washington; that the negro in suit accompanied
(321) the wife of Thomas A. Cabarrus to Ocracoke, in the spring of 1817, and Mrs. Cabarrus dying in the fall of the same year at the house of her brother-in-law, Augustus Cabarrus, at Ocracoke, the negro remained there until Augustus Cabarrus died, when she continued with his widow until and after the bill of sale to the plaintiff. In the last of February or first of March, 1819, the plaintiff authorized an agent living at Ocracoke, to take possession of the slave and send her home. The agent applied to Mrs. Cabarrus, who requested permission to keep possession of the slave until it could be ascertained whether the plaintiff would sell to her. The bill of sale was in the hand-writing of the plaintiff, and, the subscribing witness stated, was attested by him at the requst of Cabarrus, the vendor, who brought it to witness requesting him to attest it. The plaintiff was not present when it was attested, nor had the witness ever seen the consideration mentioned in the bill of sale, paid by plaintiff. The plaintiff offered no evidence of the payment of the consideration, further than that which arose from the bill of sale itself.

The defendant claimed the negro under a Sheriff's sale. He produced in evidence the record of the County Court of Carteret, shewing that on the 18th of May, 1818, a writ issued at his instance to arrest Thomas A. Cabarrus, in a plea of debt; that the writ was duly executed, and returned the 3d Monday of August, 1818; that judgment was rendered against Cabarrus at the November term following; a writ of *fi. fa.* issued, and was levied on the slave on the 17th of May, 1819, and on the 15th of July, 1819, she was sold by the Sheriff, and the defendant became the purchaser. The defendant did not prove the day when the writ was executed, but proved, that on the day when the writ was delivered to the Sheriff, Cabarrus was at the same place with the Sheriff. Cabarrus was much indebted at the time of the sale to plaintiff, and defendant relied upon the record of Carteret Court to prove that he was a creditor of Cabarrus.

The Judge instructed the jury, that the record be-
(322) tween Howard and Cabarrus was evidence against the plaintiff, and proved that Howard was a creditor of Cabarrus. That it was incumbent on a purchaser, in a

suit where his purchase is attacked by a creditor on the ground of fraud, to prove by other testimony than his deed, the actual payment of a consideration, and that if he did not do so it was a strong presumption of fraud; and that if a negro was at a distance from the place of sale, the vendee must go or send for it in a convenient time; that the circumstance of the slave's continuing with the sister-in-law of the vendor, from the date of the bill of sale to the plaintiff until the sale by the Sheriff, was too long a time, and that such a possession was in law fraudulent against the present defendant.

The jury found a verdict for the defendant. A motion for a new trial was refused, and judgment rendered, from which plaintiff appealed.

*Ruffin*, for appellant; *Gaston*, for appellee. The Reporter did not hear the arguments in this case, and has not been able satisfactorily to ascertain the points discussed by the counsel.

HALL, Judge.—I will not say in this case, that the bill of sale, unaccompanied with possession, was not fraudulent under the 13*th of Eliz. Ch.*, 5; nor will I say that the Jury ought not so to have found it: but in my opinion, the decision of that question properly and of right, belonged to the Jury. 'Tis the province of the Court to expound the Law, and it is as much the province of the Jury to pass upon the facts. The trial by Jury is guaranteed by the Constitution of the State; and the act of 1796, ch. 4, was passed for the purpose of preventing Judges from giving opinions to the Jury on matters of fact. The statute of the 13*th of Eliz. Ch*, 5, declares that all conveyances made with intent to defraud creditors, shall be void and of no effect; and whether
(323) a conveyance comes within the operation of that statute—whether it is made with intent to defraud creditors or not, is a question of fact, which, under all the circumstances of the case, properly belongs to a Jury to decide. In the absence of all other testimony, a Jury are at liberty to say, if they think fit, that a deed not accompanied with possession, is *per se*, fraudulent and void. Whether it is so or not, is a matter of fact, and not a question of law.

If in an action of trover, a demand and refusal be found by special verdict, a Court would not give judgment on such

verdict, because a demand and refusal is not a conversion, but only evidence of it; so, when the question is, whether a deed is fraudulent or not. If a Jury should find the facts, that a deed was absolute on the face of it, but that the vendor remained in possession of the property conveyed by it, such finding would not authorize the Court to give judgment—because the facts so found would not *per se*, make the deed void, but would be only evidence of fraud. And I must here repeat what I said in the case of *McRee* v. *Houston*, Murph. Reps., 450, that the law was so understood when we separated from the mother country in the year 1776: for in the case of *Codogan* v. *Kennith*, Caw., 434, *Lord Mansfield* said, that the statute of the 13*th of Eliz.* said not a word about possession; but that if the vendor remained in possession after a sale of goods, as the visible owner, it was evidence of fraud; because goods pass by delivery.

It is under these impressions that I regret my concurrence with the opinion given in the case of *Gaither* v. *Mumford*, N. C. Term Rep., 167. Nor have I formed the opinion which I am now giving, without due consideration of the case of *Edwards* v. *Harben*, 2 Term Rep., 587, and the case of *Banford* v. *Bason and others*, *Ib.*, 594, *Note A*, and also the case of *Hamilton* v. *Russel*, 1 Cranch, 310, 316. The line of demarkation between the functions of the Court and those of the Jury, is so strongly drawn by the Constitution of the State, and the act of 1796, (the latter declaring that it shall not
(324) be lawful for a Judge to give an opinion to the Jury, whether a fact is proved or not,) that to yield to those authorities, would be to transcend it.

HENDERSON, Judge.—I accord with Judge Hall, for the reasons which he has given. Whether a deed be *fraudulent* or *bona fide*, is a question of fact, and possession, or the want of possession, is evidence tending to establish it one way or the other. To make the deed void because possession does not follow it, is making it so, not because it is fraudulent, but because possession is wanting. It is true that the want of possession is so strong an evidence of fraud, that the *evidence* is taken for the *fact*, because it almost invariably follows, that a conclusion of fraud is drawn by the Jury, as a demand and refusal is frequently confounded with a conversion, for the same reason. But I should think, that even in England, where it has been certainly decided of late, that

possession not accompanying the deed is *per se* a fraud, and incapable of explanation, that if issue were joined whether a deed was fraudulent or not, and the Jury should find that the deed was absolute, but that the possession did not accompany it, they would be told that they had found the evidence and not the fact.

It is unnecessary for me to undertake to account for the late change in the English decisions; but I apprehend a solution may be found in the great disposition prevailing in all commercial countries, to make the possessor of a chattel its owner, where purchasers creditors are concerned, of which disposition a strong evidence is afforded by the statute of James, relative to the possession of goods by a trader, who afterwards becomes a bankrupt. Nor do I feel myself bound by the decision of the late Supreme Court, in the case of *Gaither* v. *Mumford*, N. C. Term R., 167, for however I may be disposed to follow precedents, and particularly those of our own Courts, yet I cannot yield my assent to a decision which converts a question of fact into a question of (325) Law, and transfers from the Jury to the Court, that, which, by the fundamental laws of our State and jurisprudence, exclusively belongs to the Jury. How the Jury would have found in this case, whether or not they would not have drawn the same conclusion which was drawn by the Judge, it is not my province to determine. Let a new trial be granted.

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ALLEMONG and LOCKE *v.* ALLISON and KELLY.

*From Rowan.*

When a Sheriff had levied an execution on certain lands, and a *venditioni exponas*, together with a special writ of *fi. fa.* issued afterwards on the same judgment, and was levied by the Sheriff on goods which seven days prior to that time, he had seised by virtue of a *fi. fa.* issuing on a younger judgment, the Court directed the proceeds of the sale to be paid in satisfaction of the *fi. fa.* which first came to hand, and was first levied.

This was a motion to have money which had been paid by the Sheriff of Rowan, to the Clerk of the Court, applied in satisfaction of an execution against one Pearson, in favor of Allemong and Locke: the motion was opposed by Allison and Kelly. The facts were these. At August term, 1820, of Rowan Court, Allemong and Locke obtained a judgment

against Pearson, on which a writ of *fi. fa.* issued, tested of the same term, and came to the hands of the Sheriff on the *26th of August*, 1820, and was by him levied on *the same day*, on Pearson's *goods and chattels.*

At May term, 1820, of Rowan Court, Allison and Kelly obtained a judgment against Pearson, on which a *fi. fa.* issued to the Sheriff, and was levied on four and a half lots in the town of Salisbury. This *fi. fa.* was returned to August term, 1820, when a writ of *venditioni exponas* and a *special fi. fa.* issued, commanding the Sheriff to sell the lots (326) before levied on, and also to make the *residue* of the debt and costs out of the *goods and chattels* of Pearson. These writs of *ven. ex.* and *fi. fa.* came to the hands of the Sheriff on the 2nd of September, 1820, and the Sheriff levied on the goods and chattels on which he had before levied under the *fi. fa.* of Allemong and Locke. The property was advertised and sold under both writs of *fi. fa.* and the money arising from the sale was not sufficient to satisfy both executions. The lots levied on under the first *fi. fa.* of Allison and Kelly, were on the same day exposed to sale, but in consequence of certain incumbrances on them, discovered on the 26th of August ,1820, no purchaser could be found. The Sheriff paid into the office of the Clerk, the money arising from the sale of the goods and chattels, for the benefit of the persons who might be thereto entitled. On these facts, the Superior Court of Rowan ordered the money to be applied in the satisfrction of the *fi. fa.* in favor of Allemong and Locke, whereupon Allison and Kelly appealed.

*Ruffin*, for Allemong and Locke, argued that they had issued their execution, and had it delivered to the Sheriff, and levied *seven days* before that of Allison and Kelly came to his hands. As between different plaintiffs, if two *fi. fas.* be of the same *teste* (as here) the Sheriff is bound to execute that first, which is first delivered to him—*Smallcomb* v. *Buckingham*, 1 Salk. 320—1 Ld. Ray. 251. This is the language of all the case and treaties, that a *fi. fa.* binds the the goods from the *teste*, as against the defendant and purchasers from him; and from the *delivery* to the Sheriff, as against other executions. There is no principle or case to be found, that as between different plaintiffs, the goods are bound or affected by the relative ages of the judgments, or by the fact that the one *fi. fa.* is an *alias*, and the other not;

but that the first delivered to the Sheriff is preferred in every case. If it were otherwise, Sheriffs would be ruined: they must be governed by the writs in hand; to (327) them alone can they look to ascertain who is entitled to the money raised: but if the law be otherwise, Sheriffs must examine and ascertain at their peril, the age of every judgment, how many executions have issued on it, and whether those he has be on old or new judgments; the writs which are his warrants, and ought to guide him, will afford him no light in his duty. But the case before the Court is very strong, because the goods had been actually seized for Allemong and Locke, and were not subject to be seized by another execution; and if sold under it, the sale would be void—(1 Show. 169—8 Johns. 347.)

But the case is clear upon another point: the execution of Allison and Kelly could not properly be issued. The levy on their *fi. fa* was a satisfaction, unless it appeared by the return that the property seized was of less value, or unless it turned out to be actually of less value upon a sale on a *ven. ex.* It is a good plea to a *sci. fa.* on a judgment, that the Sheriff upon a *fi. fa.* on this judgment, took goods in execution—(*Cro. El.* 237.) The Sheriff is bound to sell at all events, and is accountable for the value returned by him—(2 *Ld. Ray.* 1073—1 *Salk.* 322.)

The Sheriff should return that he has taken goods to a *certain amount*; the *ven. ex.* is to sell that property and raise that sum, and to levy some certain sum, being the residue of other goods. (Tidd, 929.) And a new execution cannot issue, except for the surplus of the debt over and above the value specified in the return—2 Saund., 343.

HENDERSON, Judge.—When a Sheriff has seized property under a *fieri facias*, and before he has completed execution, another *fieri facias* comes to his hand with a prior lien; or to speak more properly, having the preferable right of satisfaction, he should satisfy the last mentioned execution first. Without entering into a question as to the propriety (328) of issuing this special writ of *fieri facias*, (the value of the land levied on not being returned by the Sheriff, which appears to be the English practice,) I must confess I am strongly disposed to support such a writ, as an easy and convenient remedy. I think there did not come to the hands of the Sheriff, before he had completed the execution, that

is, before he was compellable to return the writ and pay over the money, at which time the execution was certainly completed, (though he might have completed it before the return by paying it over, if he thought proper) any *fieri facias* or other process, which had a preferable right to satisfaction, the special writ of *fieri facias* being a mere blank, and perfectly dead, until life and activity were given to it by selling the lots levied on by virtue of the original; for by the very words of the special writ, the Sheriff could not seize one cent's worth of property until the balance was ascertained, which could not be done until the lots were sold. Whether an *alias* execution can be connected with the original execution, when execution creditors are competing with each other, either as to its test or delivery; whether executions bind at the common law between persons of the above description, from their test or delivery, are questions of too much moment and difficulty to be decided on an *ex parte* argument in a case which does not require it.

I therefore think that the money should be paid to Allemong and Locke. The special *fieri facias* forming no objection thereto, as being perfectly inoperative until the sale of the lots which had been levied on.

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(329) DOE on demise of LANIER *v.* STONE.

*From Rockingham.*

Where a levy was made by a constable under a magistrate's execution, on the defendant's land, and returned on *the same day* to the County Court, which commenced its session on that day; it was held, that this was a return "to the *next* Court," within the meaning of the act of 1794, sec. 19.

Where, on the return of a constable that he had levied on land, a *venditioni exponas* was moved for, and a writ issued as follows, "ordered by the Court that the lands, &c. (describing them) levied on by the Constable, be sold," though the order of sale and the paper called a *ven. ex.* are blended together, yet it sufficiently appears there was such an order.

Where a record states that a *ven. ex.* was returned on the first day of the term, satisfied by the sale of land, and it appears from the case that the sale was actually made on the second day of the term, it will be presumed that the Clerk made such entry on the record with reference to the legal fiction that the sessions consist of but one day.

If the Sheriff has levied an execution against chattels in due time, he may complete the levy by a sale after the return day, though he cannot levy after that day.

Where a magistrate issues an execution in the first instance against goods and chattels, lands and tenements, such execution is not in the form required by the act of 1794; but if the constable return, that in default of chattels he has levied on land, it corrects the irregularity, and the informality is also cured by the 16th section of the act of 1794.

It is not necessary that a *venditioni exponas*, issuing on a constable's levy, should be made returnable to any *given time.*

Where a return to an execution against land is signed by a Deputy Sheriff, but the deed to the purchaser is executed by the Sheriff, it is a ratification of the acts of his Deputy, and a title thus consummated cannot be impaired by the return on the execution.

If the plaintiff in a magistrate's judgment knows that the defendant has personal property sufficient to satisfy his execution, and permits the constable to levy on land, and return no personal property to be found, moves on such return and levy for a *ven. ex.*, causes a sale, and becomes himself the purchaser of land, it is not a fraud *in law*, but should be left to a jury to draw their conclusion from.

This was an action of *ejectment*, tried in Rockingham Superior Court before *Daniel*, Judge.

The lessor of the plaintiff exhibited, in support of (330) his title, four several judgments obtained in his favor, on warrants before a justice, against one Ezekiel Bowen, for the sum of $218. Execution on these judgments had been stayed by the defendant, and after the expiration of the stay, executions regularly issued against the lands and tenements, goods and chattels of Bowen and the defendant, which were levied on the lands of the defendant, by the Deputy Sheriff, and the return was made in his name, on the same day on which the levy was made, viz. 27th of February, 1809. The County Court of Rockingham, to which the executions were returned, commenced its session on the 27th of February, 1809, and at that term on motion, the land levied on was condemned, and ordered to be sold to satisfy the plaintiff's judgments. A writ accordingly issued from Rockingham County Court in these words, "ordered that so much of the lands of Ezekiel Bowen and Burgess Stone, already levied on by the constable, be sold," &c. The Sheriff advertised the land forty days, and exposed it to public sale in the Court yard, on the *second* day of the succeeding Court, in May, when the lessor of the plaintiff became the purchaser, and obtained the Sheriff's deed.

It appeared in evidence, that both Bowen and the defendant had, at the time of the levy by the constable on the defendant's land, personal property sufficient to have satisfied the executions, and that the lessor of the plaintiff well knew their situation and circumstances.

The presiding Judge instructed the jury, that if Bowen or Stone, or either of them, had any personal property to be found, it was the duty of the constable to levy on that and expose it to sale, and if it did not produce sufficient to satisfy the executions, then he should levy on the land, and the magistrate should return it to Court, &c. That if they believed that Lanier, knowing that Bowen and Stone had personal property sufficient, or nearly so, to satisfy his executions, had permitted the constable to levy on the land,
(331) and return, "no personal property to be found;" had moved the Court for a condemnation of the land, taken out a writ of *ven. ex.*, caused a sale of the land, and become himself the purchaser, it amounted to a *fraud in law*, and the lessor of the plaintiff could not recover. The jury found a verdict for the defendant. Plaintiff moved for a new trial, on the ground of misdirection in matter of law, and taking nothing by his motion, judgment was rendered, from which he appealed.

*Gaston* for plaintiff.

*Ruffin* for the defendants, argued that the levy was made on the 27th of February, and on the same day the return was made to the County Court; this was not a return to the *next* Court.

That it did not appear from the record that any order of sale was ever made.

That the record shewed a return to the Court on the *last Monday* of May, and a sale on the *succeeding day*. Personal property might be so sold because the *title is in the Sheriff* by the levy—2 Saund., 345. *Aliter* as to lands which pass by the sale and deed, not by the seizure. The execution against lands in the first instance was improper, and the sale of them by the Sheriff illegal—1 Hay. Rep., 24.

The *ven. ex.* was not *tested of any term*, it was not *made returnable to any*, nor does it *describe the lands* particularly.

The return is not made by an officer recognized by our law, a Deputy Sheriff not acting in the name of his principal—2 Law Rep., 440—2 Caine's Rep., 61.

TAYLOR, Chief-Justice.—A verdict was found in this case for the defendant, and a motion for a new trial made on the part of the plaintiff, on the ground of misdirection.

(332) This was overruled, and he has appealed. The proceedings which were had before the Justice, and in the County Court, under which the plaintiff derives his title, are made part of the record; and several exceptions are made to them, which it is first necessary to examine; since, if it shall appear that the plaintiff's title is legally defective, it would be worse than useless to award a new trial.

The first exception is, that the levy on the land bears date 27th February, 1809, and that the judgment and levy were returned to the County Court on the same day, which was the first day of the session, in violation of the act of 1794, sec. 19, which requires the return to be made to the *next* Court of the County. But an attentive view of the act will shew, that its design was to give the plaintiff as quick a remedy against the land as could be had, consistently with the ceremony it prescribes of obtaining an order of sale from the Court, and to avoid the intervention of a session, or the day of a session, between the levy and the return to Court. The proceeding is *ex parte* in its nature, the defendant having no day in Court; and no possible inconvenience can arise from returning the levy during the sessions, on one day of which it may happen to have been made: it is the *first* Court after the levy is made, and the meaning of the law is, the next Court, when there is an opportunity of making the return. On the other hand, to pass over the sessions because a levy was made on one day of it, might operate as an injurious delay to a plaintiff whose judgment may have been already stayed, as it was in this case, for six months, and might further have a tendency to perplex titles by dormant liens. It therefore seems to me that the law would not be rightly construed, unless February sessions were considered the next Court in relation to this levy.

It is objected in the next place, that there was *no order of sale.* But an inspection of the record will shew that (333) there was an order of sale. A *venditioni exponas* was moved for by the plaintiff's attorney, which was granted by the Court, and then a writ issued in the following words—"Ordered by the Court, that so much of the lands of Ezekiel Bowen and Burgess Stone, already executed by the constable, be sold, etc." The order of sale, and the paper called a *venditioni exponas*, are blended together; but the order of sale was nevertheless made, and the Clerk of the County Court certifies that the transcript is a copy of

the proceedings had in that Court, from which it may be concluded that the *venditioni exponas* was first entered on the minutes, and a copy then issued to the Sheriff to authorize him to sell.

The proceeding might have been more formal, but it is right in substance.

It is said that the *venditioni exponas* was returned on the first day of the session, and the sale took place afterwards, whereby it is void. With respect to an execution against chattels, if a Sheriff has levied in due time, he may complete the levy by a sale after the return day, though he cannot levy after that day: whether he may sell land after the return day, a levy being made before, is a question not necessarily presented in the case, and one on which I give no opinion. The return of the execution is collected from the record which states it to have been made on the first day of the session, and that it was returned satisfied by the sale of land. Is this true or not? If it be true, the sale was within time, for the day on which an execution is returnable, is the utmost time allowed by law to execute it. But the case states that the sale was made on the second day of the Court; and assuming that to be the fact, it is impossible that an execution could have been returned on the preceding day, satisfied by a sale of land which had not then taken place. The fair and unavoidable conclusion, therefore, is, that the entry was so made by the Clerk in compliance with the fiction that the sessions consist of one day, and that whatever is transacted during the session, is referred to the first
(334) day of it, in legal contemplation: in strictness, an execution is returnable the first day of the sessions, though there is no act of Assembly which makes it imperative on the Sheriff to return it on that day. It is true, that the plaintiff may call upon the Sheriff, and obtain a rule against him to return his writ; but if he fails so to hasten him, it is understood by every one that the return of an execution during the session is sufficient; and on whatever day it is made, it is constantly and uniformly in legal parlance referred to the first day. I will go one step farther and say, that the practice of selling land upon execution after the first day of the sessions has prevailed so extensively, and for so great a length of time, that to call it now in question, would shake a very large proportion of the titles in the State.

Another exception is, that the execution is *not directed.* The answer is, the warrant has the usual direction, and the execution being on the same paper, has virtually the same direction, viz., "to any lawful officer," etc.

It is further objected that the execution of the Justice is issued against goods and chattels, lands and tenements, whereas it ought to have issued against the *goods*, only, according to the act of 1794. The execution is certainly not in the precise form required by that act, but the return of the constable corrects the irregularity, and renders it harmless. By his return he has done, not so much as the execution required him to do, but only what the law directed, viz., to levy upon land in default of chattels. Allowing, however, all possible strength to these objections, they are informalities, merely, and cured by the 16th section of the act of 1794.

Another exception to the proceedings, is, that the execution under which the land was sold is not made *returnable to any given time.* It is, however, as a matter of course, returnable at the next sessions, and being merely an authority to the Sheriff to sell, he might be called upon to shew (335) how he had executed it. The reason of the different rules applicable to the *capias* in *mesne* process and a *capias* in *execution*, shews that it is not essential to its validity that a return day should be specified in the writ.

In *mesne* process, if a term be omitted, the writ is void in all actions personal, and the sheriff shall not be charged, because the party not having a day in Court as he ought by the return of the writ, may be injured in the mean time.

But in *executions*, a *ca. sa*, omitting a term is not void: for the party is not to have a day in Court; his cause is at an end, and he must be in prison, whether the writ be returned or not, nor is it necessary it should be returned. 2 Salk., 700.

The remaining objection is, that the return on the execution is signed by the *deputy sheriff.* The answer to this is, that the deed was made by the high sheriff, who can take notice of the act of his deputy in selling the land and ratify it by making a title to the purchaser; a title thus consummated cannot be impaired by the return on an execution. The case of *Smith* v. *Kelly*, in this Court, was stronger, for there the deed was by the sheriff to one person, whereas the return stated that a different person became the highest bidder.

As to the objection made to the Plaintiff's title at the trial on the score of *fraud*, the various circumstances adduced in evidence and relied upon, were proper to be considered by the Jury; and whatever conclusion they might draw from them ought to remain undisturbed by the Court. It is possible that the Jury were convinced by that evidence the Plaintiff's title was founded in fraud; and could we be assured that the conclusion was thus derived, we must let the verdict stand. But as it is also possible that the Jury were influenced by the instruction of the Court, to find against the Plaintiff, it is our duty to consider whether such instruction was correct in point of law. And I cannot sub-
(336) scribe to the doctrine that the Plaintiff *knowing* there was personal property sufficient or nearly so to satisfy the execution, and the Plaintiff's permitting the constable to return that there was no personal property, and to levy on the land, &c., amounts to a fraud in law. I think there must be something beyond a knowledge and permission of those things; there must be a direction or active interference to make the Plaintiff a party to the fraud. The officer is not the agent of the Plaintiff, but of the public, and is responsible to any one who may be injured by his disobedience of the law prescribing his duty. It is not sufficient to invalidate the Plaintiff's title that he knew there was personal property sufficient, and with this knowledge passively allowed the sale of the land, but he must have been an actor and participator in the irregularity of the officer. To render a purchase at a sheriff's sale, though he be the Plaintiff in the execution, chargeable with the irregularity of the officer, because the purchaser knew and permitted it, is to extend the doctrine beyond the cases cited, in both which, the attornies sued out irregular writes and procured the wrong to be done. Finally, if it had been left to the Jury to consider from all the circumstances in this case, whether Lanier had taken an active share in the irregular levy and sale, the Court could not have interfered with the verdict; but for the reasons before given, I think there ought to be a new trial.

(337) STATUTE OF LIMITATIONS.

DOE ON DEMISE OF PRITCHARD AND OTHERS *v.* SAWYER.

*From Pasquotank.*

*Ejectment.* The lands in controversy in the year 1790 descended, on the death of one James Pritchard, to his brothers, Enoch, Elisha, David and John. Of these, Enoch and Elisha were lessors of the Plaintiff, and the other lessors were the children and heirs at-law of John and David, both of whom died intestate. David Pritchard came of age in 1803, and died in 1817, leaving his heirs-at-law infants, and they are still such; John came of age in 1805, and died in 1807, leaving his heirs-at-law infants, and they still remain infants. Enoch came of age in 1808, and Elisha in 1811. The declaration in this case was dated October 21, 1819.

The Defendant, and those under whom he claimed, had been in actual possession of the lands described in the declaration, claiming them under deeds of conveyance, from the 10th of June, 1794, up to October, 1819.

On these facts there was a verdict and judgment, in the Court below, for the Defendant, and Plaintiff appealed.

TAYLOR, Chief Justice.—The Defendant, and those under whom he claims, have been in actual possession under a colour of title, of the land in controversy, from June, 1794, to October, 1819, a period of more than twenty-five years. David came of age in 1803, and lived fourteen years afterwards. The statute therefore ran against him, and his heirs are consequently barred.

John came of age in 1805, and lived two years, so that the statute began to run against him, and completed the bar against his heirs in 1812. The statute had run out against Enoch in 1815, and against Elisha in 1818, about six
(338) months before the date of the declaration in ejectment. All the lessors have therefore lost their right of entry, and the judgment must consequently be affirmed.

HALL and HENDERSON, Judges, concurred.

## THE EXECUTOR OF LYNCH *v.* ASHE.

*From Orange.*

Under the act of 1784, relative to the transfer of slaves, a transfer by parol is good as between the original parties and volunteers under them, and is void only where creditors and purchasers are concerned.
Under the act of 1806, three years adverse possession of a slave only *barred the remedy* of the legal owner, but *gave no title* to the possessor.

This was an action of *detinue* for certain slaves, tried before Daniel, Judge, in Orange Superior Court, Spring term, 1821. The Defendant pleaded *non detinet*, the act of 1806, and the act of limitation. It appeared on the trial, that the father of the Plaintiff's testator died in March, 1781, and shortly after, the mother of the testator made a parol gift to him of the negro woman, for whom and whose increase the action was brought. The Plaintiff's testator took the negro woman into his possession, but afterwards loaned her to his mother. In the year 1793, his mother intermarried with one Hargrove, an old servant in the family of Major Strudwick. The mother, during her widowhood, always stated the slave and her children to be the property of her son, Plaintiff's testator, as did also Hargrove after his marriage; and at one period Hargrove sent them home to Lynch, but soon after they were sent back. In the year 1804, Hargrove and his wife separated; he removed to a tract of land which he obtained from Mr. Strudwick, carrying the slaves in
(339) dispute with him. On the 10th of August, 1805, Hargrove gave Mr. Strudwick a bill of sale for the slaves, and at the same time Strudwick conveyed to Hargrove an estate for life in a tract of land by deed, in which it was mentioned that Hargrove was to retain possession of the slaves during his life. In October, 1805, Hargrove re-conveyed his interest in the land to Strudwick. It was proved that Strudwick had paid some small debts for Hargrove, and expressed a wish to have the use of the slaves while Hargrove lived, saying, that at his death they should go to the rightful owner. In March, 1815, Hargrove died, and Plaintiff's testator obtained possession of the slaves, and kept them about a month, when Strudwick again obtained possession of them. The Defendant claimed as a distributee under Strudwick. Lynch died, and his executor brought this action within three years next after Strudwick got the slaves out of the possession of Lynch.

The Court instructed the Jury, that (without deciding

whether the purchaser intended to be protected by the act of 1784, was one from the donor, or might be from any person claiming under the donor) it was at least necessary to shew that Strudwick was a *bona fide* purchaser for a valuable consideration, that a *colourable consideration* would not destroy the Plaintiff's title; that if they believed from the evidence that Hargrove's possession was not an *adverse possession*, it availed the Defendant nothing; and that the act of 1806 did not merge or destroy the Plaintiff's title, although Hargrove or Strudwick had the negroes in adverse possession upwards of three years after that act went into operation; because Thomas Lynch, the Plaintiff's testator, had regained the possession in 1815, and kept them in his undisturbed possession for one month, or thereabouts, at which time the title and possession were united in Lynch, and as this was in three years next before the commencement of the action, the act of limitation did not protect the Defendant. The Jury found a verdict for the Plaintiff. A motion for a new trial (340) was moved for, on the ground of misdirection as to the law. The motion was overruled, and from the judgment rendered Defendant appealed.

HENDERSON, Judge.—I am of opinion that the law was correctly laid down by the presiding Judge, in his charge to the Jury: for, however much we may now regret that the act of 1784 was not construed as a statute of frauds, avoiding all parol gifts of slaves, as well between the parties, as where creditors and purchasers were concerned, it is now too firmly settled by a uniform train of decisions to be even questioned, that as between the parties, and volunteers under them, the transfer is good, and that it is void only where creditors and purchasers are concerned; nor can we adopt the expedient pressed upon us from the bar, that we would in this case give to the act what we consider to be its true construction, as there has been no decision that a fraudulent or colourable purchaser was not within the prohibition of the act. This would, to our understanding, be something like a subterfuge; the protection of the act is afforded to a purchaser on account of his merits—not his demerits; we cannot perceive the situation of a fraudulent and colourable purchaser to be better than that of the person from whom he purchased. Can title be strengthened by adding a fraudulent link to the chain? It appears to me that if either is to be preferred, it

is the original party; if Strudwick therefore was a fraudulent or colourable purchaser, (and this fact was properly left to the Jury) he and his voluntary representatives stand in the situation of the husband Hargrove, from whom he purchased, and as the parol gift, if made, was binding upon Hargrove, it is binding on the Defendant Ashe, who is a volunteer under Strudwick. The Judge was also correct in informing the Jury, that a possession, to be aided by the statute of limitations, must be adverse; he was correct also in stating, that three years adverse possession since the act of 1806, did not give a title, but only barred the remedy. *Skinner* v.
(341) *Skinner*, 2 Murp. Rep. 535, and as the case of *Skinner* v. *Skinner* is mentioned, I take the opportunity of retracing an erroneous *dictum* which fell from me in that case. I there stated, that three years adverse possession would protect a Plaintiff in the action of *replevin*, because the Defendant became the actor in the suit: In this I was wrong. The adverse possession for three years in the Plaintiff barred the Defendant's *action*, not his *right*, and when he in the action of *replevin* justified his taking under his title, it was no answer to say, that his action was barred, for the justification rested on his *title*, and not on his *right of action:* this *dictum* did not affect the case of *Skinner* v. *Skinner*, nor does it the present one.

BY THE COURT.—In this case the rule for a new trial must be discharged, and judgment entered for the Plaintiff.

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SMITH and STANLY *v.* NIEL and others.

*From Bertie.*

The circumstance of possession not accompanying the conveyance of a chattel is not *per se* fraud, though it may be *evidence of it.*

Whether a conveyance comes within the operation of Stat. 13 Eliz. Ch. 5, *i. e.*, whether it is made with an intent to defraud creditors, or not, is a question of fact and not of law.

This was an attachment sued out by the Plaintiffs against Niel, and levied on a negro slave. Wood, who claimed the slave, interpleaded, and an issue was directed to determine in whom the property in the slave was. It appeared in evidence, among other matters, that on the 30th of June, 1819, Niel executed an absolute bill of sale to Wood for the

negro, but that the possession of the slave did not accompany the conveyance, but remained continually in Niel (342) until ten days before this attachment issued, when Niel absconded, leaving the negro. On these facts the presiding Judge instructed the Jury, that if there was nothing but the absolute conveyance without possession, that, in point of law, was fraudulent against creditors. The Jury found that the slave was the property of Niel, and from the judgment rendered pursuant to this verdict, Wood appealed

PER CURIAM.—We will not say that the bill of sale unaccompanied with possession was not fraudulent under the 13 Eliz. Ch. 5; nor will we say that the Jury ought not so to have found it; but in our opinion, the decision of that question, properly and of right, *belonged to the Jury*. It is the province of the Court to expound the law, and it is as much the province of the Jury to pass upon the facts. The trial by the Jury is guaranteed by the Constitution of the State; and the act of 1796, ch. 4, was passed for the purpose of preventing Judges from giving opinions to the Jury on matters of fact. The statute 13 Eliz. Ch. 5, declares that conveyances made with intent to defraud creditors shall be void and of no effect; and whether a conveyance comes within the operation of that statute, whether it is made to defraud creditors or not, is a *question of fact*, which, under all the circumstances of the case, properly belongs to a Jury to decide. In the absence of all other testimony, a Jury are at liberty to say, if they think fit, that a deed not accompanied with possession, is *per se* fraudulent and void; whether it is so, or not, is a matter of fact, and not a question of law. If in an action of trover, a demand and refusal be found by special verdict, a Court would not give judgment on such verdict, because a demand and refusal is not a conversion, but only *evidence* of it: so when the question is, whether a deed is fraudulent or not, if a Jury should find the facts that a deed was absolute on the face of it, but that the vendor remained in possession of the property conveyed by (343) it, such finding would not authorise the Court to give judgment, because the facts so found would not *per se* make the deed void, but would be evidence of fraud. And we must here repeat what was said in the case of *McRee* v. *Houston*, 3 Murp. Rep 450, that the law was so understood when we separated from the mother country in the year

1776; for in the case of *Codegan* v. *Kenneth*, Cowp. 434, Lord Mansfield said that the stat. 13 Eliz. said not a word about possession, but that if a vendor remained in possession after a sale of goods as the visible owner, it was evidence of fraud, because goods pass by delivery.

Nor have we formed the opinion which we are now giving, without due consideration of the case of *Edwards* v. *Harben*, 2 Term Rep. 587, and the case of *Bamford* v. *Baron et al*, Ib. 594, Note A, and also the case of *Hamilton* v. *Russel*, 1 Cranch 310, 316. The line of demarkation between the functions of the Court and those of the Jury, is so strongly drawn by the Constitution of the State, and the act of 1796, (the latter declaring that it shall not be lawful for a Judge to give an opinion to the Jury, whether a fact is proved or not,) that to yield to those authorities, would be to transcend it. The rule for a new trial is therefore made absolute.

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(344) STATE *v.* M'LEOD.

*From Surry.*

The testimony of a witness, taken down in writing by a magistrate, cannot, on the trial of the same matter in Court, be used as evidence in chief, particularly when the witness is present; but may be used to shew contradictory statements made by him.

Misconduct on the part of a jury, to impeach their verdict, must be shewn by other testimony than their own.

*Indictment* for *perjury*, tried before *Paxton*, *Judge*, at the spring sessions, 1821, of Surry Superior Court. The perjury was charged to have been committed in making oath before a magistrate to obtain a warrant against one Smith, for feloniously taking the horse of the defendant. The horse had been taken out of the defendant's stable after dark; and on the next day was in the possession of Smith, who was a constable, and had levied on the horse by virtue of executions in his hands against the defendant. Smith advertised the horse publicly for sale, and the defendant saw the advertisement. On the oath of the defendant, one Campbell, a magistrate, issued a warrant against Smith, on which he was apprehended; and, on examination by Campbell, discharged. The defendant was then cautioned by one Simonton, of the danger of taking such oaths as he had taken. Some time afterwards, the defendant applied again to Campbell, for a

warrant against Smith: Campbell refused to issue it, advised the defendant to be cautious, and at the same time told him that he thought Smith committed a felony in taking the property in a clandestine manner by night; but, that if he wished to be certain, it was advisable to go and consult the Solicitor for the State in that circuit. The defendant went away, was absent two days, returned and told Campbell that the Solicitor was not at home, (as was the fact,) but that he had consulted Mr. Connor, an attorney, and again re-
(345) quested a warrant, which Campbell still refused to grant; he however wrote one for the defendant, and declined putting his signature to it. The defendant then applied with this warrant to another magistrate, Morrison, for his signature. Morrison at first refused, until the defendant assured him that he had consulted Mr. Connor, and procured him to write the warrant to which he requested Morrison's signature. Morrison then took the oath of the defendant to the warrant, which was in substance the same with the former one, and signed it. On this evidence the jury found the defendant guilty; and on a motion for a new trial was made on two grounds: 1st.—The examination of Smith, the prosecutor, taken down in writing, by the magistrate, on the return of the second warrant, was rejected by the Court, on the ground that Smith was present and might be sworn. 2d. Misconduct on the part of the jury, as proved by their affidavits, which the Court refused to hear, on the ground that their verdict must be impeached, if at all, by testimony other than their own.

The Court refused the new trial, and passed sentence, from which defendant appealed.

HENDERSON, Judge.—The inferences to be drawn from the opinions of Campbell, the magistrate, from Connor, the attorney, and the attempt to consult the Solicitor for the circuit, are all questions of fact, on the point whether the oath was corrupt; and these circumstances were all properly left to the jury. The examination of the defendant in the warrant and prosecutor here, would have been proper evidence to impeach the testimony given by him on his trial, as any other statement made by the witness on the same subject would be, for the purpose of shewing a contradiction: but it is not evidence in chief, that is, to shew the truth of the facts contained in the examination: and it is more clearly so, if

possible, when the witness himself was in Court. In
(346) this case, it appears that it was offered as evidence in chief; it was therefore properly rejected. As to the misconduct of the jury, it has been long settled, and very properly, that evidence impeaching their verdict must not come from the jury; but must be shewn by other testimony. We can therefore perceive no grounds for a new trial; and

BY THE COURT—It is ordered that the motion for a new trial be overruled; and that the Superior Court of law for Surry county, proceed to judgment against the defendant agreeably to this opinion, and according to law.

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## STATE *v.* HOWORTH.

*From Buncombe.*

By an act of the Legislature passed in 1810, three commissioners were appointed, whose duty it was made to examine a certain turnpike road, and make report of its state and condition at each County Court, and if from their report it appeared that the road was not kept in good order, a prosecution was to be instituted against the proprietors. By an act of 1819, the power of appointing the commissioners was vested in the County Court, their number reduced to two and it was made part of their duty to give information to the grand jury of the Superior Court when the road was out of repair. On an indictment against the proprietors, the commissioners under the act of 1819, who reported the road to the grand jury as being out of repair, may be permitted to prove the state of the road notwithstanding the act of 1810 declares that the proprietors shall not be indicted except upon the view and report of the commissioners appointed by the act of 1810; for by the appointment of those under the act of 1819, those under the former act ceased to exist, and yet the proprietors must be liable, as the convenience of the public and their interest in a highway cannot be surrendered by implication.

The defendant was indicted as one of the proprietors of the turnpike road leading from the Tennessee line,
(347) by the Warm Springs, to Asheville, in the county of Buncombe. William Brittain and Henry Dryman were appointed commissioners under and by virtue of an act of Assembly passed in 1819, and as commissioners aforesaid, reported to the grand jury said road to be out of repair at the time set forth in the indictment, and on the trial below, they were sworn and offered as witnesses to prove the charge. It was objected by the defendant that the evidence was inadmissible, because that he could be indicted as overseer and proprietor of said road no otherwise than upon the view

and report of commissioners appointed by an act passed in 1810. The objection was overruled, and the defendant convicted. A new trial having been refused, and sentence pronounced, the defendant appealed.

The case was submitted without argument, and

TAYLOR, Chief Justice, delivered the opinion of the Court.

The question presented by the record, (for the case has been submitted without argument,) is, whether the defendant has been properly convicted of not keeping the road in repair, upon the evidence of the commissioners appointed under the act of 1819, ch. 110? The objection to the conviction turns upon this, that by the act of 1810, ch. 35, three commissioners were appointed, whose duty it was made to examine the road, and make report of its state and condition at each County Court, and if it appeared from their report that the road was not kept in good order, then a prosecution was to be instituted against the proprietors. By the act of 1819, above referred to, the power of appointing the commissioners is vested in the County Court of Buncombe, the number reduced to two, and their duty prescribed; amongst other things, of making information to the grand jury of the Superior Courts, when the road is out of (348) repair. Upon this verdict, it must be taken for granted, that all the allegations in the indictment, necessary to shew the defendant liable under the two acts, were supported at the trial; that Brittain and Dryman were duly appointed commissioners. If the defendant's objection were to prevail, this unjust consequence would follow, that he might avail himself of the extention of the charter granted by the act of 1819, and yet be irresponsible for the neglect of keeping the road in order; for there would be no persons empowered to make the view and give information of the condition of the road, since the commissioners appointed by the act of 1810 must have ceased to exist as such, when others were appointed according to the act of 1819. What is to become of the public interest in the mean time? Was it the meaning of the charter to sacrifice that altogether to the emolument of the proprietors, or to combine both objects together? That the road shall be kept in order, was a duty of paramount obligation, which the public had a right to enforce; and if the regulations made by the first act should

appear ineffectual for that end, the legislature might change them from time to time. If no commissioners ever had been appointed, the proprietor of the road was nevertheless liable; for the convenience of the public, and their interest in a highway, cannot be surrendered by implication. The evidence was admissible in every view, and the conviction is right.

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(349) STATE *v.* ROBERTS.

*From Rutherford.*

A killing on sudden quarrel, to avoid great bodily harm, places a man under circumstances amounting to legal provocation, and though such circumstances cannot justify or excuse the act, yet on account of human frailty, the homicide is extenuated, and is but manslaughter.

This was an indictment for the murder of Hugh Allison, and the facts were these: The prisoner and one Freeman came to the house of the deceased, and at length commenced shooting at a mark for a wager, with the prisoner's rifle; the deceased soon joined in the amusement with his own gun, and after concluding their sport and drinking together, the deceased went into his house, leaving the prisoner at the place where they had been shooting. Some time afterwards, the prisoner came to the door of the house, and proposed to his brother, who was in the house, to shoot with him for a wager. The wife of the deceased then spoke to the prisoner, and ordered him to go away, telling him that he had been the cause of trouble enough already; that he knew she did not allow him to come there, and at the same time put her hand upon his forehead and pushed him. He refused to go, and she then told him if he did not go she would throw water in his face; he still refused, when she did throw water, and struck his hat, and, according to the statement of some of the witnesses, threw a part in his face. She then threatened, if he did not depart, to scald him, and accordingly poured some water from a kettle, and as she returned to the door, the deceased told her to let him alone, and as she stated, she threw the water out at the door by the side of the prisoner, without touching him, but according to the testimony of other witnesses, a part of it fell on his breast.

(350) At the instant of her throwing the water, the prisoner placed one of his feet within the door, and struck her a violent blow on the breast with his rifle, which passing down her body lodged on her left thigh. She sank

down on the floor and fainted. At this moment, the deceased exclaimed, "Lord! how pale Sally is," and immediately, in company with one Dunn, stepped out of the door and advanced upon the prisoner without speaking. The prisoner told them twice or thrice to stand off or he would shoot, but they still continued to advance, and the prisoner to retreat to the edge of the road, a distance of nineteen or twenty paces from the door, when he fired, and gave the mortal wound. At the time the gun was discharged, the deceased was endeavering to catch the muzzle. It was in proof that the deceased said after he was shot, that he intended to have taken the gun from the grisoner, and to have beaten him, and shortly before his death he said he was convinced the prisoner intended to kill him when he shot the gun. The deceased was a stout, athletic man; when irritated, he was violent, and by some deemed dangerous, and these facts the prisoner was well acquainted with.

The Judge instructed the jury, that if they considered the facts deposed to as proved by the evidence, in point of law the defendant was guilty of murder, and not of manslaughter; that the stroke given to the wife of the deceased with a rifle, under such circumstances, manifested a malicious and revengeful disposition, and the homicide having ensued from and in consequence of the stroke given by the defendant to the wife of the deceased, he was answerable for the consequences.

The jury found the prisoner guilty, and a motion for a new trial having been refused, sentence of death was pronounced, whereupon the prisoner appealed.

The *Attorney-General* argued the case on behalf of the State, and *Seawell* (by request of the Court), argued for the prisoner.

(351) HENDERSON, Judge, delivered the opinion of the Court.

Murder is a homicide committed with malice aforethought. Manslaughter, as far as this case renders a description necessary, is homicide committed under the influence of sudden passion, for the law pays such regard to human frailty, as not to put a hasty and a deliberate act on the same footing, with regard to guilt: so also if a man be greatly provoked as by pulling his nose, or other great indignity, and he *immediately* kills the aggressor, this is manslaughter, and not

murder. Manslaughter, therefore, on a sudden provocation, differs from excusable homicide, *se defendendo* in this, that in the one case there is an apparent necessity for self-preservation to kill the aggressor, in the other, no necessity at all, being only a sudden act of revenge, and this is manslaughter. Place the wife and the prisoner in the same grade, as to the commencement of the quarrel and affray, (and she certainly commenced it, and by her rudeness forfeited the protection due to her sex) and had she died of the blow, the prisoner would have been guilty of manslaughter, and not murder. The husband then places himself in her situation, and commenced an attack on the prisoner, aided by Dunn; the prisoner retreats, and tells them to stand off, having the gun in his hands from the first; they approached so near as to get hold of the muzzle of the gun, and the prisoner discharges it and inflicts the mortal wound. If the foregoing definitions of murder and manslaughter be right, and they are taken from Justice *Blackstone's Commentaries*, (and I think there cannot be a doubt of their correctness) this is a killing upon a sudden quarrel, and to avoid great bodily harm; for if we are to take the acts as evidence of the intent, the conduct of the deceased and Dunn shew their object to have been to chastise and beat the prisoner, and he was not bound to submit to a whipping—he was (to use an expression of *Beville*) in a state of legal provocation, which did not justfy
(352) or excuse the act, but on account of human frailty extenuated the homicide to manslaughter. There is but one possible view by which the transaction can be made to be murder; it is this: The prisoner had inflicted an apparently dangerous wound; it was the duty of those present to arrest him, and it was his duty to submit if required to do so; if this had been the intent of the deceased and Dunn, and they had so declared it, and acted in such a manas to cause it to be believed, and to avoid the arrest and not a beating, the mortal wound had been inflicted, it would have been murder and not manslaughter; but it was not put in this manner by the presiding Judge. The Jury were told, that the evidence, if believed, proved the offence of murder, without any regard to the question, What was the object of the deceased and Dunn in pressing on the prisoner? and what, from their conduct, would a person placed in the prisoner's situation, conclude to be their motives? I think the Jury was improperly instructed, and that there should be a new trial.

## STATE *v.* CAIN AND PRICE.

*From Martin.*

When a bill is found by the same Grand Jury that made the presentment upon the testimony of some of their own body, not sworn in Court as witnesses, such proceeding is in opposition to the act of 1797, ch. 2, sec. 3, and the bill must be quashed.

This was an indictment under the act of Assembly against fornication and adultery, and was founded upon a presentment of the Grand Jury. The *bill* was found by the same Jury that made the presentment upon the testimony of some of their own body, none of whom were sworn in Court as witnesses. These facts were admitted by the prosecu-
(353) ting officer, and the Court, on motion, quashed the bill. The prosecuting officer appealed to this Court.

The case was argued by the *Attorney General* for the State.

HALL, Judge.—The act of 1797, ch. 2, sec. 3, declares "that no person shall be arrested, or charged before any Court, on a presentment made by a Grand Jury, before the attorney acting for the State shall prepare a bill, and the bill be found by the Grand Jury to be a true bill." It is the province of the Grand Jury to make presentments from the knowledge of any one of their own body, or from the testimony of any witness who may give evidence before them, having been sworn in Court, and sent to them by the Court, if they think fit so to do; and I think the proper construction of the act if, that on every presentment that is made, a bill of indictment shall be framed, and the witnesses in support of the bill shall be *sworn in Court*, and *sent* to the Grand Jury—that they shall be examined *de novo*, and the Grand Jury shall find the bill a true bill or not, as they shall judge right from that examination, without regard to any information they might have been possessed of, when they made the presentment. I think this is the true construction of the act. If so, the bill in question, it is admitted by the attorney for the State, was not so found, and for that reason ought to be set aside as a nullity, and judgment entered for the Defendants.

TAYLOR, Chief-Justice, and HENDERSON, Judge, concurred.

(354) STATE *v.* BRICKELL.

*From Halifax.*

A caption of an indictment forms no part of the indictment, and therefore it is not a ground for arresting judgment, that the indictment does not show in its caption that it was taken before a Court in North Carolina. While the indictment stood on the records of the Court below, it appeared to be an indictment of that Court; and when sent to this Court, the caption of the record of which it is a part, officially certified, renders it sufficiently certain.

This was an indictment for an assault and battery tried in Halifax Superior Court, on which the Defendant had been convicted. A motion was made in arrest of judgment, for that it did not appear, either in the caption or any other part of the indictment, that it was taken before any Court in the State of North Carolina.

The caption and commencement of the indictment were as follows:

"*Halifax*, ss. { *Superior Court of Law, for the County of Halifax, 4th Monday after the 4th Monday of March*, 1820.

"The Jurors for the State, upon their oath, present, that William Brickell, yeoman, &c."

The case was argued by the Attorney General for the State, and submitted on the part of the Defendant.

HALL, Judge.—The Clerk of the Superior Court of Law for the County of Halifax, and State of North Carolina, certifies the record sent up in this case, as a record of that Court, and that record has the following caption: "State of North Carolina, Halifax County, Superior Court of Law." He then sets forth the indictment, commencing in these words, "Halifax County, Superior Court of Law, &c." "The Jurors for the State, upon their oath, &c." It is insisted that the judgment should be arrested, because it is said, that in the caption of the indictment, it is not stated that the county of Halifax is in the State of North Carolina. The objection surely (355) cannot be sustained, because a caption to an indictment is no part of it. Chitty on Crim. Law, 326; 1 Saunders, 250, d. N. 1; nor is it necessary that it should have any, because the captain to the record clearly shews in what Court, County and State, the indictment was found. While the indictment remained on the record of Halifax Court, it appeared to be an indictment of that Court; when sent into this Court, the caption of the record (of which it is a part) is

a copy of the style of the Court at which it was found, and renders it thereby sufficiently certain. I think the reasons in arrest of judgment should be overruled.

TAYLOR, Chief-Justice, and HENDERSON, Judge, concurred.

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PRACTISE—COSTS.

STATE *v.* SAUNDERS and others, securities of Sarah Jeffreys.

*Caswell County.*

This case was heard before Daniel, Judge, at the Spring Term, 1821, of Caswell Superior Court, when it appeared that Sarah Jeffreys had been convicted of murder, and sentence of death had been pronounced, with judgment against her for the costs. The prisoner appealed to the Supreme Court, and gave the Defendants as securities to the appeal bond. The Supreme Court overruled the prisoner's exceptions, and final judgment was pronounced by Caswell Superior Court. The Governor afterwards pardoned the prisoner, and she took the insolvents' oath. *Vide* 2 Murph. Rep. 480. The Defendants were charged with costs, and contended they were only liable for the costs of the Superior Court. The Solicitor General contended they were
(356) liable for the costs of the Supreme Court, and the costs of the Superior Court, including prison charges. The Court decided that the Defendants were liable for the costs of the Superior and Supreme Court, but that the prison charges were not to be taxed in the bill of costs, and rendered judgment against the Defendants accordingly; from which the Solicitor General appealed.

HENDERSON, Judge, delivered the opinion of the Court:

This Court passes no judgment in criminal cases, except for the costs expended in this Court. It acts directory to the Court below, and its power to award costs expended here, arises only from construction. Caswell Superior Court will therefore enter up judgment for all costs except the costs of this Court. The jailer's fees form no part of the costs, consequently they are not to be included in the judgment.

# IN CHANCERY.

(359) IN EQUITY.

EDWARDS *v.* MASSEY.

*From Wayne.*

The affidavit on which an order of sequestration is awarded, should state *positively* the existence of the facts on which the application is grounded, or if only matter of belief, the grounds of that belief. Though a bill, *deficient in matter*, cannot be aided by the defendant's answer, or by proofs in the cause; yet where sufficient matter is stated, but *insufficiently verified*, the want of sufficient verification may be supplied by proofs or admissions.

The rule that Courts of Equity interfere by *ne exeat* only in case of *equitable* demands, applies where *money*, not *property*, is the subject of controversy.

The bill in this case set forth, that complainant was the owner of a negro slave who had been in the possession of himself and those under whom he claimed, fourteen years, when, by seduction or some other clandestine means, she was taken into the possession of the defendant; that an action of detinue was commenced against the defendant by this complainant, for said slave, which suit is still pending, and that the defendant was in prison at the time of filing the bill, he having been surrendered by his bail. The bill then proceeded to state, that complainant had been informed, and verily believed, that it was the intention of the defendant to take the oath of an insolvent debtor, and when discharged from confinement, to remove the slave beyond the limits of the State, and thereby prevent complainant from a recovery of his right—and therefore prayed that defendant might be compelled to give bond and security for the forthcoming of the slave to abide the decision of the suit at law; and on failure to give such bond, that the Sheriff might be commanded to take the property into his possession: the bill concluded with a prayer for writs of injunction and subpœna.

Writs were granted accordingly, and defendant
(360) having failed to give bond, the property went into the possession of the Sheriff.

The answer admitted that the slave was in the possession of the defendant, and also the existence of the suit at law, and stated that defendant *claimed title* to the slave as admin-

istrator to his father, and believed his right to be good, both in law and equity;—that defendant was imprisoned for want of bail in the suit at law, but having afterwards given bail, was discharged. The answer positively denied any intention of removing the slave out of the State, or any declarations of such an intention.

Upon the coming in of the answer, defendant prayed that the injunction might be dissolved, and complainant moved for leave to reply to the answer, and take testimony to support the allegations in the bill. The Court directed the case to be heard on bill and answer only, and decreed that the injunction be wholly dissolved, and the bill dismissed with costs, whereupon complainant appealed to this Court.

*Gaston* for the appellant.—The maxims of equity and conscience on which a Court of Equity is founded, are capacious enough to meet all the varieties of human transactions—2 Harg. Jur. Arg., 307. The very ground of the interference of a Court of Equity is, that otherwise the party is without remedy, although in conscience he should have a remedy. On this principle, a bill has been allowed against the representative of a tenant who had committed waste by digging ore; because such a wrong must have some redress, and there was none at law—1 Fonb., 4, 8. It never interferes further than is necessary; wherever the right, therefore, can be fairly tried at law, by the removal of some impediments, it contents itself with the removal of them. 1 Fonb., 10. So also it will render judgments effective, by providing for the safety of property in dispute *pendente lite*. 1 Fonb., 11; Mit-
(361) ford, 4; Coop. Eq. Pl., 38; 6 Vesey, 172. The interference of equity in this case is peculiarly proper, for without it the most valuable property of the country is at the mercy of every one; and it is a species of property which, of all others, may most easily be taken from the possession of the rightful owner. It is by no means a novel interference, for an injunction has been often granted to prevent the destruction of personal property until a suit was decided. 1 Madd., 130; 10 Ves., 139, 163. So also an injunction against an insolvent executor. 2 Madd., 176. Against infringing a patent during a suit at law. Wyatt's Reg., 235. The appointment of receivers in disputed causes proceeds on the same principle. 2 Madd., 187–8; 13 Ves., 105; Wyatt's Reg., 245; *Mordaunt* v. *Hooper*, Ambler, 311.

But it was wrong in the Court below to dismiss *with costs*, and we may appeal for costs. Ambler, 521; 1 Vern., 250; 1 Brown, 141. The original power of Chancery was to give costs when the bill was founded on false suggestions, but they were never given on a case that was fit for consideration, but only where there were no just grounds for the proceedings. 2 Madd., 413, 416; 18 Ves., 16; 3 Atk., 234.

*Mordecai*, for the appellee, assimilated the proceeding which had been had in this case, to the writ of *ne exeat*, which, he contended, was granted only in cases where the demand is merely *equitable*, and never where the demand is at law. *King* v. *Smith*, 1 Dickens, 82; *Brocker* v. *Hamilton*, 2 Dick., 154; *Ex parte Duncombe*, *Ibid.*, 503, 609. Thus, the writ has been refused in a case where the agent of the complaint had hired his negroes and refused to account, and declared his intention to go to Antigua, and complainant had no remedy at law, his witnesses being abroad. Ambler, 76. The reason why a *ne exeat* is granted, is, that the Court cannot take bail in the case—*Ex parte Whitmore*, Dickens, 143—and where it can take bail, it follows that the (362) writ will be refused—*cessante ratione, cessat et ipsa lex.*

A verdict was obtained in an action on a marriage contract, and defendant threatened to leave the Kingdom before a final judgment; under these circumstances, Lord Hardwicke refused the writ, saying, "It is merely for a *ne exeat*, on which no decree can be made, and were I to grant the motion, it might be discharged on defendant's putting in bail, which plaintiff *might have had* when he brought his action." 2 Atk., 210; *vide* also *Ex parte Brunker*, 3 P. Wms., 312. A plaintiff shall not have double bail, both in law and equity. *Pakeman* v. *Cosby*, 3 P. Wms., 314, note M.

The writ has, indeed, been sometimes granted in a case where equity had concurrent jurisdiction, but it was admitted that the demand must be *equitable*. *Atkinson* v. *Leonard*, 3 Brown, 217. A *ne exeat* issues with a view to obtain security from a person about to leave country, when the other party has not a legal remedy, and cannot hold him to bail. It issues only upon a *certain, equitable money* demand, at the instance of a plaintiff who shews title to sue. 2 Madd., 182–3. A writ of *ne exeat* cannot be obtained against an attorney upon a *legal* demand, on the ground that he is priviled, and cannot be arrested—(2 Madd., 186; 15 Ves.,

444)—because, if the Court could interfere, it would require bail where none is required by law; so here the Court cannot interfere to bind the defendant more effectually than the law binds him. In the case before the Court, the complainant was not without a remedy at law; he might, in the first instance, have brought *replevin*, or he might have dismissed his writ of *detinue*, and then brought replevin; so that even if the Court of Equity is to become ancillary to the Courts of Law, wherever the process of the law may fall short of the exigency of the case, there was, in this instance, no necessity for such extraordinary interference.

(363) But even if this were a case of a demand purely equitable, in which the Court might, according to ancient authorities, interfere, or a case in which the Courts of Law and Equity have concurrent jurisdiction, then the statement made by the bill is insufficient to authorize the interposition of the Court; for it should be charged *positively* that the defendant is going abroad, or some declaration of his to that effect—(2 Madd. 183—7 Ves. 417—8 Ves. 410.) The statement here, is, "that he is *informed* and *does believe* that it is the intention of said Massey to take the oath of an insolvent debtor, and as soon as he is discharged from confinement, he intends to remove the slave beyond the limits of the State." In a case reported in 3. Johns. Ch. Rep. 75, the statement was, "the petitioner is *informed* and *believes*, that the plaintiff is selling off his property, and is about to remove out of the State," and, says the Chancellor, the evidence is not sufficient of plaintiff's intention to go abroad. It is *belief* merely from *information*, &c. There ought to be a positive affidavit of a threat or purpose to go abroad.

HENDERSON, Judge.—The affidavit on which the order of sequestration was awarded, is defective, in not stating *positively* the existence of the facts on which the application was grounded, or if only matter of *belief*, the grounds of the belief, that the Court might judge whether it was a rational and well-founded belief, or an idle and vain one; and did this case stand on the bill alone, I think the sequestration should be taken off. But, I am of opinion, that sufficient appears from defendant's answer to support it.

By this, I would not be understood to mean, that a bill, *deficient in matter*, can be aided by the defendant's answer, or by proofs in the cause; but where sufficient matter is stated,

but *insufficiently verified*, the want of sufficient verification may be supplied by proofs or admissions.

(364) In this case, taking bill and answer together, it is admitted that the plaintiffs, and those under whom they claim, have been in possession of the slave for fourteen years, claiming title; that by *seduction, or some other clandestine means*, the defendant lately obtained possession of them; that he was lately in prison, for want of bail, in the action at law brought for the slave, and that he has since given bail. The defendant also says that he is in possession of the slave, *claiming title* as administrator of his father; but the nature of the title he does not state, nor account for his long want of possession. In the action of *waste*, the law gave the writ of *estrepement*, to prevent waste pending the action; an action *on the case* is now most generally brought for waste, and Chancery interposes to prevent waste, because of the *estrepement* in the Common Law Courts. In the case of *taking*, the Common Law Courts give the action of replevin, which was, at the commencement of the proceeding, now under consideration, and indeed yet is, almost out of use here, as the action of waste is in England.—By replevin the plaintiff was restored to the possession of the goods before trial. The same principle which induces the Chancery in England to interfere in the case of waste, applies here with all its force in cases of property in slaves, at least where there has been a taking by seduction or clandestine means; for such a taking I have no doubt will support an action of replevin; for the nature of the property is such that possession may be lost by the most vigilant owner, without there being an actual taking or the commission of a trespass.

As to the objection that Courts of Equity will not interfere but in cases of *equitable* demands, that is the case where *money*, not *property*, is the subject of the controversy. In money demands, the Common Law gives no other security than bail: it would overleap the intention of the framers of the

(365) Common Law, for the Courts of Equity to go further— Not so where property is the subject matter; then the Court of Equity will interfere in particular cases. This, I think, is one of those cases where it will, for the reasons before given.

BY THE COURT.—Let the sequestration be sustained.

NOTE.—The were five other cases against the defendant Massey, involving facts similar to those disclosed in the foregoing case. As the decision of the first necessarily governed the whole, and all were submitted to the Court on one argument, the Reporter deems a detailed statement of all unnecessary.

IN EQUITY.

MARY S. BLOUNT v. Ex'rs and devisees of THOS. BLOUNT.

*From Edgecombe.*

A, by his will executed in North Carolina, appointed four executors, two of whom resided in Tennessee, and devised to his nephews and nieces, certain lands in Tennessee, directing his executors, previous to a division of these lands among the devisees, to raise therefrom such sum as would be sufficient to pay all his debts. The rest of his property he directed the executors to sell, and the money arising therefrom he bequeathed to complainant. On a bill filed against the executors and devisees, shewing that the acting executor in North Carolina had applied a portion of complainant's residue in payment of testator's debts, and praying that the lands charged might be sold, and she reimbursed; it was held that as the lands were without the limits of North Carolina, no decree could be made by this Court against the acting executor here to sell those lands.

The bill set forth that the complainant was the widow of Thomas Blount, who died in the year 1812, having first duly made and published a will in writing, whereby he devised to the three sons and two youngest daughters of a deceased brother, all his share of certain lands in Tennessee, owned by John Gray Blount and himself, to be divided among such of the five children of his deceased brother as should be living at testator's death, with a declaration that out (366) of said lands, before any division should be made, was to be raised by his executors in such manner as they should think best, a sum of money equal to all the just debts of the testator, which he directed to be appropriated to the payment thereof. The rest of his property, the testator by a subsequent clause, directed his executors to sell, and the money arising from the sale thereof, together with such sums of money as might be due him, he devised and bequeathed to complainant. The will appointed four executors, whereof two resided in North Carolina, and two in Tennessee, and the bill alleged that one only of the four named, Thomas H. Blount, a resident of North Carolina, had qualified. The bill then stated that the testator was at the time of his death considerably indebted, and that the acting executor had withheld a large portion of the estate bequeathed to her in the residuary clause, and as he alleged, applied the sum of $9,382.16, in payment of the debts of the testator; that the lands in Tennessee charged with the payment of the testator's debts, consisted of many valuable tracts, and were, at the time of his death, fully sufficient for that pur-

pose. The bill then complained, that the executors, on various pretences, evaded the claim made by the complainant to have reimbursed as much of her legacy as had been absorbed in payment of the debts of testator, alleging among other reasons, that the lands had been sold, and the proceeds were to be applied to the payment of a judgment for twelve thousand dollars, confessed by Thomas H. Blount, the acting executor, to his father, John Gray Blount, who was also made a defendant in the bill. The bill further charged, that this judgment was confessed on a bond made by testator and John Gray Blount to one Sumner, to secure the payment of a sum of money advanced to them by Sumner; that John Gray Blount received the benefit of Sumner's loan, and upon a recovery effected by Sumner against him for this money, he prevailed on the executor, Thomas H. Blount, to confess a judgment in his favor for the
(367) amount of Sumner's recovery; notwithstanding it was notorious, that had the debt been solely the testator's, yet he had claims against the said John Gray Blount to a very large amount, which might have been set off against the recovery of the said John Gray Blount. And as to a release which it was alleged by the executors had been given by complainant to John Gray Blount, of any demands which she might have against him on account of transactions between him and the testator; the complainant averred that she signed it without any consideration, and without knowing from what benefit she was excluding herself. The bill concluded with a prayer, that the lands charged in the will might be sold, and complainant reimbursed the sum withheld from her, and that if any part of the said sum had been disbursed by the executor, that she might have satisfaction out of the lands so far as he had disbursed, and a decree against him personally for the residue.

The answer of Thomas H. Blount admitted the death of the testator, as charged in the bill, and that he qualified as executor in North Carolina, as did also Wm. G. Blount in Tennessee. The devises in the will of the testator, were as set forth in the bill, and as the testator was, at the time of his death, largely indebted, and this respondent could not raise money for the payment of these debts by the sale of the lands, he was obliged to pay them out of the property devised to complainant, which he was advised, was assets in his hands for that purpose. It was admitted in the answer that

there were lands in Tennessee owned in common by the testator and John Gray Blount, but this respondent admitted nothing as to the boundaries or value thereof, having no personal knowledge of them, and never having seen the title deeds. The management of the sale of these lands was left, by this respondent, to William G. Blount, from whom he had recently learned that a sale could not be effected.

The respondent admitted that a judgment had been (368) rendered against him as executor of testator, in favor of John Gray Blount, for $9,267.10, with interest from June, 1815; which sum, the respondent averred, he believed was justly due to John Gray Blount, who, as surety for his testator, paid the same after his death, in satisfaction of a bond given by testator and said John Gray Blount to one Sumner, the brother of complainant. That Sumner had presented the claim to this respondent for payment, alleging it to be the debt of his testator, and had agreed, at one time, to accept a conveyance of the Tennessee lands as security for its payment, and that afterwards, as this respondent knew, John G. Blount had been compelled to pay the debt at a considerable sacrifice. That this respondent knew of no set-off, of which he could avail himself, more especially as the complainant had given him formal notice that she had executed a release to John Gray Blount, by which she acquitted him of all demands which she might have against him in right of the testator, and further, this respondent knew nothing of the accounts which had subsisted between his testator and John Gray Blount, as the books were retained in the hands of the surviving partner.

The answer of John Gray Blount set forth particularly, the origin of the tenancy in common in the Tennessee lands between his brother the testator, and himself, and stated that the testator was entitled to one-third part of about fifty thousand acres of land in Tennessee, of the situation or value of which (as it was continually fluctuating), nothing could with certainty be said. That at the time of the testator's death, this respondent expressed a belief that the lands charged with the payment of his debts, were sufficient for that purpose; that at this time he had no knowledge of any debts except those due Sumner, and the firm composed of the testator and himself, and that this respondent did not expect or intend to demand payment of the debts due the firm, if an arrangement for the settlement of the part-

(369) nership transactions entered into between the testator and this respondent in testator's lifetime, could be carried into effect after his decease, or if the complainant would sign a release. The answer averred that complainant did voluntarily sign the release without any practises of this respondent, and that the consideration therefor was a release of the claim he had against his brother, the testator; that the judgment obtained against Thomas H. Blount was fair and without collusion; that it was legally taken for monies which this respondent had paid Sumner as the security of Thomas Blount; that this respondent never received any money from Sumner or any other person, to secure the payment of which, the bond was given to Sumner; nor does he indeed know the consideration of that bond, as it was given on some transaction in which he was no party; nor is there any entry on the books of the firm to shew that the money was applied to the use of John G. and Thomas Blount; and that Thomas Blount died indebted to the firm more than eleven thousand pounds. The respondent finally submitted, that as it appeared from complainant's bill that the lands are in Tennessee, an independent government, the Court could not entertain a suit with regard to them, or make any decree affecting them.

Such of the five children of testator's brother, as lived out of the State, were made parties defendant to the bill, and publication as to them was regularly made.

*Gaston*, for the complainant, contended, that if there was money in the hands of Thomas H. Blount, not disbursed in the payment of debts, the complainant was entitled to a decree for the amount. So, if he might have paid his testator's debts by a sale of the lands, the complainant was entitled to a decree for the amount of her bequest disposed of by him. And even if the bequest had been entirely applied to the payment of debts charged on the lands, and no cul-
(370) pable delay had taken place in selling the lands, complainant might ask, that the executor should be decreed to execute this power of sale so as to be enabled speedily to refund to complainant what was due to her; and this Court might compel him to call on his co executors to aid in the transaction, and if they refused, to act without them.

The land being in Tennessee, is not a circumstance which

will prevent this Court from decreeing what is conscientious between Mrs. Blount and the acting executors. 1 Ves., 203, 447, 454; 4 Inst., 213. There is no Court but this that can give redress. If she applies to the Courts of Tennessee she may be told, no one in that State has ever acted as executor, and Thomas H. Blount is not within reach of their process.

Where a power is not given *nominatim*, but to *executors*, there, even at the common law, *those who act* may exercise the power. Jenk. Cent., quoted 6 Johns., 79; *Howell* v. *Barnes;* Cro. Car., 352, S. C.; Sir W. Jones, 382; Pow. on Dev., 307; *Yates* v. *Compton*, 2 P. Wms., 308; 3 Dyer, 371, b., cited by Thurlow; 1 Bro., 137; Co. Lit., 113, a.; 2 Hen. & Mum., 136.

Unquestionably it may be so done, since the stat. 21 H. 8 Ch. 4, which is a remedial act. Co. Lit., 113, a.; 4 Reeves, 241; Cro. Eliz., 80; 11 East, 287. Should any unexpected difficulty occur in carrying such a decree into execution, it will be in the power of Thomas H. Blount to shew these by way of excuse.

*Seawell* for the executor, contended, that it appeared from the bill itself, that the complainant was not entitled to the relief she sought; the bill stated, that no steps had yet been taken to execute the trusts of the will; that the devisees and all the executors, except Thomas H. Blount, resided out of the State, and that the land was out of the State. No bill could be so framed, as not to bring the devisees before the Court; because, by the shewing of the bill they were
(371) interested in the land. If this Court should order the executor to sell the land, they could not protect a purchaser under such sale

*Ruffin* for the defendants.—The lands in Tennessee cannot be sold by a decree of this Court. If they were situated in this State, under existing circumstances, there could not be a decree of sale. The devise passes no estate to the executors; the will gives them a *bare power*, and at common law, *all* the executors must join in the execution of a *bare power*, though that power be given to them as executors, and they are to act *ex officio*. Co. Lit., 113, *a*. The case of *Howell* v. *Barnes*, is differently reported by Croke and Jones, and as it was decided after the stat. 21 H. 8, was probably governed by it—*vide* Pow. Dev., 307. The stat. 21, H. 8, provides only for the case of a *refusal* to act by one executor. Here there

has been no refusal. An executor cannot refuse by an act *in pais;* it must be in open Court, and entered of record. Toller, 42. The Court will not decree that Thomas H. Blount alone should sell, for he cannot make a good title.

But this Court wants *jurisdiction* in this case. The land is in Tennessee, as are also Wm. G. Blount and his brothers and sisters, the devisees of this land. The *subject* and the *persons* to be affected, are both beyond the jurisdiction of this Court. No case can be found, where a bill has been sustained, and *relief granted* under such circumstances; for the jurisdiction of Chancery is always founded upon the presence, or rather, having within its reach either the person or subject matter of litigation. Indeed, the jurisdiction of all Courts must be founded on one or other of those circumstances, as there can be no other mode of giving the party concerned, notice that his interest is *sub judice.* This is more particularly the case with a Court of Equity, the primary jurisdiction of which is, *agere in personam.* 1 Fonb.
(372) Eq., 34; 1 Harr. Ch., 59; 2 Pow. Con., 7, 8; *Hopkins* v. *Bridges*, 4 Hen. & Mun., 413.

This subject has been most debated in suits affecting lands without the limits of the country of the Court, and so far as the jurisdiction depends upon the locality of the land, it is determined by the object or propose of the bill. If the bill be to obtain *partition*, or in any other way to operate *directly* upon the land, it must be within the country of the Court, so that the decree may be enforced by the writ of assistance. 2 Com. Dig. "Chancery E." *Petits case*, cited in *Kildare* v. *Eustace*, 1 Vern., 421; *Guerrant* v. *Fowler*, 1 Hen. & Mun., 5; 2 Madd. Eq., 361; 1 Ves., 454.

So a bill was dismissed which prayed the Court to put Complainant *into possession* of land in *St. Kits. Roberdeau* v. *Rouse*, 1 Atk.; 543. It is admitted, however, that in cases of *contract, trust, fraud*, in relation to land out of the State, the Court of the country, where the Defendant may be found, may decree; but it is only where the *person* of the Defendant is within the State, that such decree can be made. All the text books, and all the cases, go upon that circumstance. 2 Madd. Eq., 361; 1 Fonb. Eq., 34; *Kildare* v. *Eustace*, 1 Vern., 405; *Arglasse* v. *Muschamp*, 1 Vern., 75; *Toler* v. *Costent*, 2 Vern., 494; *Foster* v. *Vassal*, 3 Atk., 589, 2 Com. Dig., 543; *Massie* v. *Watts*, 6 Cranch, 157–8.

In saying that no relief has been granted, unless the sub-

ject or person was within the jurisdiction of the Court, it is meant relief against *absent* Defendants. The utmost extent to which the Courts have gone, has been from necessity in certain cases, to relax the rule requiring all interested to be brought before the Court, so far as to permit the Complainant to proceed against those within the jurisdiction, leaving the others out, and then no decree is made against those who are absent; and in fact, this mode of proceeding will only be allowed when a *perfect* decree can be made as to those (373) before the Court, and justice done as far as they are concerned. Finch's, Ch. 83; *Smith* v. *Hibernian Co.*, 1 Sch. & Lef, 240; *Williams* v. *Whinyates*, 2 Bro., Ch. 399; *Ingram* v. *Lanier*, 1 Hay. Rep., 22.

The act of 1787, ch. 22, does not aid this case. By the 6th proviso, the ground or cause of action, or transaction on which the bill may be brought, must take place *within the limits of this State.* Here the ground of suit is, *a breach of trust in not selling lands in Tennessee.*

The body of the act relates to two classes of cases. 1st, those arising upon *personal duties*, upon which the decree might be satisfied by execution against the estate or body. 2dly, those affecting *lands within this State*, of which the Court could deliver the possession to the Complainant. Whenever *lands* out of the State, or the disposition of them, are in controversy, the foundation of the action necessarily arises out of the State.

The want of jurisdiction need not be pleaded, but if it appear on the hearing, the Court can make no decree, even though an answer has been put in. 2 Mad. Eq., 225, 239; 1 Ves., 447; Mitford, 100; 1 Hen. & Mun., 5; 6 Cranch, 157–8. The lands are in Tennessee, and the *Lex loci* must govern them. Foreign Law cannot be taken notice of by this Court. It is matter of fact, and as such should be proved. 7 Cranch, 115; *Church* v. *Hubbart*, 2 Cranch, 236. This Court is not necessarily to know what the Law of Tennessee may be on this subject.

*Gaston*, in reply.—It is objected that the Courts of North Carolina have not jurisdiction in this case. By the act of 1787, ch. 22, Defendants made parties pursuant to that act, are as completely parties for the exercise of jurisdiction, as though they had been personally served with process; "the Court may thereupon decree as shall be thought just, and issue process to compel performance," &c. It cannot be

denied, but that the Legislature was competent to
(374) vest jurisdiction in this way, and it is certain that it has done so; the words are unequivocal; and that it designed to do so, is not singular. In England, the rule was, if any person interested was out of the reach of process, not to make him a party, but to proceed against the others. 2 Mad. Eq. 144, 1 Sch. & Lef. 240. Here a different rule was adopted, because of our different situation; all interested were to be made parties, some by personal process, others by publication. And abundant provisions were made to prevent any pernicious effects from the exercise of this jurisdiction over non-residents. The present case is undoubtedly of the number of those comprehended in the 6th proviso, and if so, there is no good objection to the jurisdiction. But independent of our statute, on English Chancery principles the objection is not well founded Wherever the Court of Chancery acts directly *in personam*, and not *in rem*, the locality of the thing cannot give, nor does it take away jurisdiction. It does not give, for unless there be a conscience to be coerced, on which the Court can act, it acts not at all. 2 Madd. 144. Nor will it take away jurisdiction. *Lord Cranstoun* v. *Johnston*, 3 Ves. jr. 182, 5 *Ibid.* 182; *Arglasse* v. *Muschamp*, 1 Vern. 75–135; *Kildare* v. *Eustace*, 1 Vern. 419, 1 Salk. 404, 1 Eq. Ca. Ab. 133, 1 Hen. & Mun. 5. The cases quoted by Defendant's counsel are all consistent with this position Tennessee can have no other jurisdiction than North Carolina, founded on the personal subjection of the parties, and if North Carolina Courts want jurisdiction, no other Court can have it.

But it is objected further, that a Court cannot have jurisdiction when it cannot enforce the decree; and this Court, it is said, cannot enforce a decree of sale, but the Courts of Tennessee may. The Courts of Tennessee can have no more power to force Thomas H. Blount to sell, than this Court has to compel William G. Blount to sell. This Court may enforce its decree personally against Thomas H. Blount, and by sequestration against the others, of any effects they have here. 1 Vern. 135.

It is further objected that this Court cannot judi-
(375) cially know whether a sale by the Defendants, or one of them, will convey a good title, and Courts of Equity never order sales, but when they can make purchasers safe. If, by decreeing the sale, be meant a judicial sale, a decree

*in rem*, the proposition may be admitted, though even then it has many modifications; but if by the expression, be meant a decree that he should sell who has been entrusted to sell, the proposition is denied. Perhaps it would not decree the execution of such a power, if it *knew* the power could not be effectually executed; but the authorities do not go beyond this.

But it is said, that even if the Court has jurisdiction, the Complainant is not entitled to relief; for this Court cannot compel any to convey, but the two executors within this State; and that conveyance alone can answer no purpose, as the power is joint. To this it is answered, that the power is given *virtute officii;* and he who undertakes the office, is competent to the performance of it. The argument on this point does not turn, as is supposed, on controverting the distinction between a devise to sell, and a devise of lands to be sold: admitting that a *power*, not an *interest*, is given, the enquiry is here, how and to whom is that power given?

It is contended, that when given, either in words or by plain intent, to executors officially, such a power is a mere adjunct of the office, as though the testator had said, to such only of them as shall act. And if those words are used, the *one qualifying* may execute it—9 Cranch, 152, Co. Lit. 113, a. This position is conclusively proved by Jenk. Cent. 43, 44, *Howell* v. *Barnes*, according to the report either in *Croke* or *Jones*, Pow. Dev. 306–7, case of *Isabel Goodcheap*, *Ibid.* 307, 308, cases of *2 Leon. 220*, and *Dyer, 371, b*, as explained by Powell, 298, 299. But at all events, this objection is cured by stat 21 H. 8. As to the objection that the bill does not state a *refusal* by the other executors to act, it states what is tantamount in a bill in Equity, though it would not (376) be on a special verdict. Powell 309, 310. But the Court may decree in the alternative, that the executor in North Carolina, who has qualified, shall sell alone, if the other executors refuse to join him.

The Reporter regrets, that he has it not in his power to present the argument made in behalf of some of the devisees residing in Tennessee, by P. M. Miller, Esquire, of that State.

HALL, Judge—The justice of the Complainant's claim cannot be for a moment doubted, but the remedy by which it is to be asserted, is matter of more difficulty. This arises

from the circumstance, that the lands out of which her claim is to be satisfied, are situated without the limits of the State, and most of those persons concerned in interest are non-residents.

Nothing can be hazarded in saying, that in many cases a Court of Equity may proceed against *the person*, although the lands which may be the subject of controversy are not within the jurisdiction of the Court; as where a Defendant has contracted to convey lands, he may be compelled to do so, by executing a deed:—where he is a trustee, he may be compelled to execute the trust, although the trust relates to lands without the limits of the State. The Court proceeds against him personally, but will make no decree to bind the title of the land.

It is equally clear, that where the land lies within the jurisdiction of the Court, it may become the subject matter of a decree; although the person in whom the legal title is, is a non-resident, they may proceed *in rem*, as in the case before put they may proceed *in personam*. But the difficulty here is, that the lands, and the persons who have the legal title to them, are in the State of Tennesse. In every independent government, the right to soil is vested in the sovereign power; and it belongs to that power to grant titles to lands, and regulate the transfer of titles from one individual to another, in any way it may think proper; and to
(377) declare that all conveyances not conformable to such regulations, are null and void. Hence it follows, that all laws, judgments, and decrees, made in any other government, relative to such lands, have no binding force.

I think it will be admitted, that a Court of Equity ought not knowingly to do a vain thing—make a decree which it cannot enforce. We cannot, therefore, make a decree to bind the land, because it is not within our jurisdiction. Suppose that we direct that Thomas Blount, one of the exedutors, should sell the land, either upon the ground that he may sell *virtute officii*, or that the power to sell has devolved upon him by stat. 21 Hen. 8, in consequence of the refusal to sell of the other executors, which statute is in force in North Carolina. If a purchaser from him should bring an ejectment to recover the lands so purchased, as the State of Tennessee has a right by law to regulate and lay down the mode by which the titles to land in that State shall be acquired, would it not be competent for the Courts to judge whether

Thomas Blount, as executor and *eo nomine*, could sell the lands or not? Whether, the other excutors having refused to sell, he could sell by virtue of any statute, or act of their Legislature, authorising a sale in such cases, as the statute of the 21 Hen. 8 does? If their Courts should be of opinion, in either case, against the validity of the sale, the purchaser could not recover. If the lands were in this State, a Court of Equity here would have it in its power to protect a purchase made under its own decree.

Again—Suppose by the laws of Tennessee, *three* witnesses were necessary to a will of lands, and only two should be necessary in North Carolina, (as is the case,) and lands were directed to be sold by decree of this Court, which lay in Tennessee; and suppose that the executor clearly had a right to sell by the words of the will, will it be for a moment contended that a sale of lands under such authority would (378) be valid? Our law says, that a last will found among the valuable papers and effects of a deceased person, or lodged in the hands of any person for safe keeping, if it be in the hand writing of the deceased, proved by the requsite number of witnessee to be so, shall be good and valid: but suppose there is no such law in Tennessee, would a devise in such will here, be valid there? or a sale of lands in Tennessee, by an executor clothed with authority for that purpose, be valid? If we direct a sale to be made by Thomas Blount, whether such sale would be good or not, would depend upon the laws of Tennessee. No decree made by us, then, would, or could be enforced, unless it should be sanctioned by the laws and by the Courts of Tennessee. It might be enforced, not because we made it, but because they approved of it—it would derive no authority from us, and therefore, I think we would be doing a vain thing to make any decree respecting the sale of the lands. I think the laws of Tennessee must be consulted, in order to raise money out of those lands, as directed by the will, and perhaps they can be consulted in no better way, than by applying to the Courts of that State. But it has been argued that all necessary parties are before the Court, because publication has been made as to non-residents, and that is an adequate substitute for the service of subœna. 'Tis true that the law presribes that mode of giving notice, (where actual notice cannot be given,) and no decree can be made without observing it: but when the property lies out of the State, relative

to which a bill in Equity is brought, and the defendant is not actually before the Court, but publication has been made only, how is a decree to be enforced? Not *in rem*, because the property is not within the jurisdiction of the Court, nor *in personam*, because process of attachment, or of any other sort, cannot reach the person of the defendant, so as to compel a compliance with the decree. There surely can be nothing in this argument.

No decree, therefore, ought to be made against Thomas H. Blount, to sell the lands in Tennessee.

# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA.

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## DECEMBER TERM, 1821.

### JONES *v.* FRAZIER.

*From Rutherford*

**An award ought not to be set aside, unless it *certainly* appears to be against law, and that in a case where the arbitrators meant to decide according to law.**

The question presented in this case, was, whether an award which had been set aside by the Superior Court of Rutherford, was properly set aside, and the plaintiff properly ordered to pay costs: and the following were the facts:

The plaintiff had purchased of the defendant a tract of land, and before he had fully paid for it, discovering that his vendor claimed the land under a younger patent, when it had been previously patented by Tench Coxe, he sued on the covenants in the deed; and before issue was joined, the parties agreed to refer it to arbitrators, and their award to be a judgment of Court. Frazier had been in actual possession of the land for seven years, claiming under his (380) patent. The award was in the following words:—

"We the undersigned, being mutually chosen by, &c. to settle, determine, and give an award about a controversy existing between them, respecting a certain tract or parcel of land which said Jones now lives on, having taken the claims of both parties into consideration, do award, that Jones shall pay all legal costs upon his suit against Frazier. We do further award and say, that as it doth appear to us the fee simple of the tract of land that Jones bought of Frazier, was

not in Frazier at the time of the sale, therefore Frazier shall give up the judgment or execution that he has against Jones, for the sum that yet remains unpaid of the price of the land, and that in three and six months, he shall pay back the purchase money that he has already received."

The affidavit of one of the arbitrators was read in the Court below, from which, it appeared, that their decision was founded on an opinion that the seven years possession of Frazier could not give him title, inasmuch as his patent was included within the bounds of the elder patent to Coxe; and that those claiming under Coxe, having been in uninterrupted possession of a part of the elder patent were, by construction of law in possession of the whole.

*Mordecai* for the plaintiff. The only grounds on which an award can be set aside in a Court of Law, are misbehaviour of the arbitrators, or, according to some authorities, error apparent on the face of the award. Actions at law will not lie to correct mistake of arbitrators, or to examine the merits of an award: the testimony of the arbitrators cannot be received to shew such mistake—*Howland* v. *Douglas*, 2 Johns., 62.

Courts of Equity relieve against *palpable* mistake, or miscalculation, or partiality, or corruption; but there is no such remedy at law in cases of submission not within the
(381) statute—*Barlow* v. *Todd*, 3 Johns. 368. These cases differ from that before the Court only in this: that this is an application to *set aside* an award; those were actions—the one to repair an injury by an award, the other to enforce performance by suit on the arbitation bond. But even that difference will not be found to exist in the case of *Cranston et. al.* v. *Ex'rs of Kenney*, 9 Johns. 212, which was a motion to *set aside* an award. The Court there says, awards are only examinable when the condition is to be made a rule of Court, and then only for corruption, &c.

The last cited case differs from the one before the Court in this, that the submission was not by rule of Court, whereas, this is; but the case of *Lucas* v. *Markham*, 2 Burr., 702, steers clear of this difference: That was a motion for an attachment for not performing an award made under a submission, which had been made a rule of Court. Lord Mansfield says, the Court will not enter into the merits of a matter referred to arbitration, but only take notice of such legal objections as appear on the face of the award, and the misconduct of the

arbitrators. And it is stronger than the case now before the Court: for the Court is not bound to grant an attachment; and in some cases, they will neither set aside the award, nor grant an attachment to enforce it, but leave the party to his remedy by action. *Hales* v. *Taylor*, Stra., 695; *Pedley* v. *Goddard*, 7 Term Rep., 73.

It does not appear on the face of this award, that the decision is contrary to law; but if it did, it does not follow that the award should be set aside, unless it also appear that the arbitrators intended to decide according to law, and mistook it. Kyd, 351.

But if the award were clearly bad, and ought to be set aside, the Judge erred in setting aside and declaring that the *Plaintiff should pay costs;* in other words, pronouncing judgment upon the whole matter against the Plaintiff. If the award was set aside, the suit should have been continued, either under the rule of reference, or if that were discharged, for trial.

(382) TAYLOR, Chief-Justice.—As I think the real and substantial justice of this case was settled by the award, I should be unwilling to set it aside, unless compelled to do so by some rule of law. When Jones bought the land, he expected to obtain an undisputed title; but discovering that the vendor claimed under a younger patent, when the same land had been previously patented, he sued on the covenant in the deed; and before the cause was put to issue, the parties referred it to four of their neighbors to settle. The arbitrators decided, from the fact of the older patent, and possession under it, that the Defendant's seven years' possession did not give him a title, and that the possession of those claiming under Cox's patent, was co-extensive with their claim. Admitting the law to be otherwise, still it gives Jones such a title as is liable to be drawn into controversy and which he cannot establish in the common way of land titles, by producing recorded grants and deeds, but must resort to parol evidence to prove Frazier's possession. It may happen, too, that some of the parties claiming under the elder patent may have been under disability during the whole time of Frazier's possession, thereby preventing it from ripening into a title. Now an award ought not to be set aside until it *certainly* appears to be against law, and that in a case where the arbitrators meant to decide according to law. From the few facts set forth in the case, I cannot draw this infer-

ence; and therefore think that the judgment of the Circuit Court, setting aside the award, should be reversed, and judgment be entered according to the award.

HALL, Judge.—This award sets forth no fact, on account of which, it ought to be set aside. If it was right to look into the affidavit which accompanies it, that affidavit, instead of militating against it, furnishes the strongest reasons why it ought to stand. The Plaintiff sold a tract of land to
(383) the Defendant, for which an older grant had issued, and whether the title under that grant had been lost, and acquired by the junior grantee, by a seven years uninterrupted possession, had never been ascertained by a trial between the parties. The arbitrators were at liberty, and I think did right when they released the Defendant from a contract for the purchase of land, over the seller's title to which such a cloud was hanging: they were right in saying, he should not be bound by a contract which would necessarily involve him in litigation. There is no evidence that he had any knowledge that the land was claimed by any other person than the Plaintiff, at the time of the purchase. I think the judgment of the Superior Court which set aside the award, ought to be reversed, and a judgment entered confirming it.

HENDERSON, Judge, concurred.

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(384) HARRISON *et ux. v.* BURGESS *et al.*

*From Halifax.*

Where a cause was removed to this Court at a period when the Court, on motions for new trials, considered matters of law only, and during the pendency of such suit, the Legislature declared that this Court *does* and *shall* possess power to grant new trials upon matters of fact as well as law, the Court may consider the case on matters of fact, for such law is not unconstitutional.

The wife of the testator may be the person to whose safe keeping his will, all in his own handwriting, is entrusted, according to the acts of the last session of 1784, for in this there is nothing incompatible with that union of person and interest which exists in law between them.

Where a will is found in the drawer of a bureau, commonly kept locked, in which the testator's wife was in the habit of keeping her money, jewels, &c., and which the testator pointed out as the place for depositing his will, it is found among *his* valuable papers or effects, within the meaning of the act.

HARRISON *v.* BURGESS.

**The signature of subscribing witnesses is no part of a will, and if there be but one to a will of lands, it may be proved to be all in the testator's handwriting, and to have been found among his valuable papers or effects.**

This was an issue to determine upon the validity of the will of one Irvine. The will, which had but one subscribing witness, had been offered and proved in Halifax County Court, by that witness, as appeared from the endorsement made thereon. It was afterwards offered for probate, under the act of the second session of 1784, by proof that it was all in the handwriting of the testator, and had been by him delivered to some person for safe keeping, or that it was found among his valuable effects after his death.

It was objected below, that the Court could proceed no further to act in the case, it appearing that the paper had already been proven in the County Court, before the offering of it a second time. This question was reserved by the Court, and the issue, viz.: "Is the paper writing
(385) offered for probate, a good will to convey real estate?" was submitted to a jury.

It appeared from the testimony of the subscribing witness, that a short time before the death of the testator, he, taking the paper out of his bed, already signed by him, declared it to be his last wlll and testament, and called upon her to attest is. The plaintiff then offered evidence (which was objected to by the defendant, but received by the Court) to shew that the paper was all in the handwriting of the deceased, and was found among his valuable effects; and for this purpose, the mother of testator's widow was called, and stated that the paper was written several days before it was signed, and was kept by testator in his bed; that after it was signed by him and witnessed, he handed it to the witness, (the mother of his wife,) and desired her to put it away in his wife's drawer and lock it up, and that she immediately did so. This drawer belonged to a bureau, in which the wife kept her trinkets, jewels, money and clothes, and it was always kept locked. It further appeared, by the testimony of another witness, that he (the witness) accompanied the wife of the deceased home, from the Shocco Springs, at which place Irvine died, and that in the room in which the paper was signed, he saw the widow take the present will out of the drawer of a bureau. This witness did not know whether the drawer was locked, and did not look inside of

it. Three witnesses then swore that the whole of the paper, except the signature of the subscribing witness, was in the handwriting of Irvine. No counter testimony was introduced, but it was insisted, that on the law arising from the facts disclosed, the paper was not the last will of Irvine, under the latter act of 1784.

The Court instructed the jury, that although the will had but one witness to it, yet if they were satisfied that it was all in the handwriting of the deceased, and that it had been found among his valuable papers or effects, or lodged (386) in the hands of any person for safe keeping, that it was sufficiently proven under the act of the second session of 1784, and that under that act the wife might be a depositary. The jury found that the paper writing was not a last will and testament to convey real estate. A new trial was moved for, and refused, and plaintiffs appealed.*

The case was argued by Gaston for the defendants, and by Seawell for the plaintiffs.

*Gaston.*—1. The verdict ought not to be set aside as a verdict against evidence. This Court has not power so to do. *Wright's ex'rs* v. *Wright's heirs*, 2 Law. Rep., 625. The legislative declaration, that this Court *does* now and *shall* possess the same power to grant new trials on matter of fact as is possessed by the Judges of the Superior Courts, can only enlarge its power as to *future* cases, cannot affect a case which was here prior to the passage of the act. *Ogden* v. *Blackledge*, 2 Cranch, 277. Bill of Rights, 4th, 12th and 24th sections. See also the argument of Chief Justice Kent, 7 Johns., 503.

But if the Court has the power, it will not exercise it, if, by any possibility, the verdict can stand with the evidence. An issue of this sort is emphatically confided to the *jury*. See act of 1784. The jury may have disbelieved the witnesses. The Judge who tried the cause, and who decided every question of law in favour of the appellants, was satisfied with the verdict. It was not possible to anticipate the act of Assembly, and therefore so much only of the case is presumed to be stated, as brings before this Court what was

*After this cause was removed into this Court, and during its pendency here, an act was passed by the Legislature, declaring that this Court "does and shall possess the same power to grant new trials on matters of fact, as is now possessed by the Judges of the Superior Courts."

*then* proper for its consideration. But the verdict was
(387) right upon the evidence. The essential ceremonies were not proved. *Formalities* required by statute cannot be supplied. 1 Mad., 43. The will was not found among the valuable papers of the deceased; there is no evidence that it was the *same* drawer or bureau spoken of by the mother of Mrs. Irvine; nor that there was anything in the drawer.

It was not deposited with any person for safe keeping. It was not given to the mother of Mrs. I. to *keep*, and she did not keep it; Irvine did not give it to his wife, nor direct it to be given to her, but merely designated the place where it should be put. There is no evidence as to the person who kept the *key* of this drawer.

2. The verdict ought to stand, for the charge of the Court was erroneous against the appellees in this: the wife, under the act of 1784, cannot be the depositary of the will. The words of the act are, "lodged in the hands of any person for safe keeping." "Lodged," not kept by *himself*, but placed with another;—"any person," he may select anyone he pleases, but it cannot be himself This case is contradistinguished from that wherein *he* keeps it among his papers or effects. The wife and her husband are in law *one person;* her existence is suspended; her custody is to *all* intents his custody. 1 Bl. Com. 442, 3 Inst. 110. The evils of such a construction as is contended for on the other side are great —the wife cannot be a witness for or against her husband, and a will, *if she chooses*, is perfectly good *without any witness.*

3. The charge was erroneous in permitting a will partially attested to be proved as a will entirely unattested. The first act of 1784 prescribed what attestation was necessary to make a will valid; the second act was designed for a case where there was no attestation. The two modes of authentication are perfectly distinct. That now insisted on can only apply where the will, and *every part of it*, is in testator's handwriting—the attestation is a part of the instrument. Co. Lit. 6 a.

4. The case should be dismissed because the former
(388) probate remains uncancelled—that probate is a valid act, and while it remains in force, the County Court is *functus officio.* 2 Hay. 167, 2 Law Rep. 414, 464.

*Seawell* in reply.—As to the act of 1821, which declares

that this Court "*does*" possess the same power, &c. that the Superior Courts possess, it is said that the Legislature is not competent to expound its own meaning, because the Constitution declares that "the legislative, executive, and judicial powers of the government ought to be forever separate and distinct from each other." What is the meaning of these words? It is that the Legislature, in its character of the law-making power, shall not take cognizance of, or decide any question or matter of controversy between citizen and citizen, nor make any law by which the Courts of Justice should exercise the powers belonging to the executive, nor should either the executive or supreme judicial powers take upon them to legislate. What is there in this to hinder the Legislature from explaining its own meaning? In the nature of things it must follow, that as the Legislature possesses power to enact laws, it must possess the power of declaring in the *same way*, what it has enacted. It cannot indeed say to A, your case is within the meaning, and to B, your's is without it; but no policy (if questions of policy were proper for the consideration of this Court) interferes with its declaring generally, what is its meaning in a particular act. To declare *generally*, is to establish a rule; to declare *specially*, is to apply it; the former is the office of the *law-maker*, the latter belongs to those who are to *expound* and *enforce* the law. But it has been said, if the Legislature does declare that to exist, which does not, its declaration cannot alter the state of things. This to a certain extent is true; the Legislature, by declaring something *has* existed, cannot change what has passed; but possessing the power to give
(389) new jurisdiction to this Court, declaring that this Court *now does* possess such jurisdiction, certainly *confers* it.

The opinion of Chancellor Kent has been read; a sufficient answer to it is to be found in 3 Cranch 79, decided by the Supreme Court of the United States, and in 2 Mass. Rep. 120, decided by Chief-Justice Parsons, and in 2 Cranch, 386, where the Supreme Court declares, that if the meaning of the Legislature be clear, *it must be obeyed*, without regard to inconveniences.

This act does not present the only instance in which the Legislature has acted upon causes pending in the Supreme Court. Look to the act of 1811, directing that no certificate shall be given by the clerk, no entry shall be made on the record that a cause is decided, nor any execution issue, until

a *written* opinion with the reasons at length shall be filed by the Judges. That act affected existing rights precisely as the present act does. It regulated the remedy for parties litigant.

But it is urged, that the wife cannot be the depositary of the will, being one with her husband. The proposition is not universally true—we know that to some purposes the wife is separate and distinct. When a wife is called to testify to any fact, her evidence must be admissible, unless it may concern her husband; and when he is dead, she may then be classed with all other witnesses. May she not prove, like any legatee, that the will was deposited with her for safe keeping? The act does not make it necessary the will should be lodged with a *stranger*, the words are, "*any* person." But if the will be not good under this clause of the act, it is under the next, because it was found among the valuable papers or effects of the testator.

As to the last objection: the only enquiry necessary in examining it is this:—what is the will? The answer is, that it is the declaration of a man, seriously made, in regard to the disposition of his property after death. Does, then, the name of the witness, written at the bottom, give us
(390) any idea of this disposition? Would the *will* contain a word more or less with or without the name? The attestation is not part of the *will*.

HENDERSON, Judge.—This case was brought to this Court before the commencement of the last Legislature, at which time this Court could grant new trials in matters of law only. At the last session of the Legislature, an act was passed, declaring that this "Court *does* and *shall* possess the same power to grant new trial, as well upon matters of fact as law, as the Superior Courts of Law now have,"* and the first question is, does the law of the last session embrace this case? and if it does, is it unconstitutional, as interfering with vested rights? The words are plain and unambiguous; the intention cannot be mistaken; they prescribe a rule for the government of the Court thereafter; they profess not to interfere with the decisions of the Court under the former law. But it is said, that if by law the Court did not possess the power, can a Legislative declaration that it does, give the power? I answer that it does, not by operation of the old

*NOTE.—By act of 1822 this law is repealed.—*Rep.*

law, but by the new law; it is only a short way of legislation; it is simply saying, that by such words, to-wit, those used in the former law, we mean such a thing, and when, by the words used, the Legislative will is made known, it is the law of the land; the words are immaterial, and although the Legislature cannot make a thing to be, which is not, by their declaration, as, to make what is white, black; yet, it is competent for them to say by the word "white" they mean *black*; and whatever may be the meaning of the former laws upon the subject, we have now a plainly expressed legislative will, that this Court does and shall possess the power to grant new trials in matters of fact; and this is not a judicial act, which is an exposition of the laws in being, and applying them to particular cases, but purely a legislative act, declaring the will of the Legislature, to be ap-
(391) plied in all cases thereafter as the rule of action or decision. But it is said, in this case it interferes with the vested rights of the defendant, and if so, the Court will not apply it to divest those rights. To declare that the property of A belongs to B, has been by this Court decided to be beyond the power of the Legislature, in the case—*Den on demise of Robertson* v. *Browne*, relative to Mrs. Browne's lands.

To decide on this objection, we must examine the nature of the rights of this defendant. In the Court below, the jury found a verdict in his favor; the plaintiffs moved for a new trial, which was refused by the presiding Judge, and judgment given for the defendant, upon which the plaintiffs appealed to this Court; and as regards matter of fact, the Judge below, who refused the new trial, was the only power which could redress any injury which the plaintiffs might have sustained in matter of fact, at the time the appeal was taken and the cause brought into this Court; but this Court had jurisdiction in matter of law, and was the proper appellate Court, and the appeal was, as it could be only, on the final judgment in favor of the defendant, and not on the interlocutory order refusing a new trial. By this appeal the judgment was annulled, and all rights derived from it fell to the ground. The alleged vested right of the defendant is not properly secured, or belonging to him by the existing laws; but by that immunity (arising from the organization of our Courts of Justice) in the enjoyment of the consequences of an erroneous exposition of the law (if it be erro-

neous) by an interlocutory order in a cause still depending, and the legality in the final determination of which (speaking abstractedly) depends upon the correctness of this interlocutory order. This is not such a vested right as that the Legislature cannot extend the powers of the Court wherein the cause is still depending, to examine into the alleged error, and if there is one, to correct it by the rules which were in existence at the time the new trial was refused, and by which the presiding Judge should have regulated himself in
(392) the decision. A right, to be inviolable by the Legislature, should be one derived from the laws, or at least under a final judgment of a Court in a case decided, and the parties out of Court: not an immunity from a re-examination of a point in a cause still pending, which point could not be re-examined by the appellate Court on account of its organization. I therefore think that this Court possesses the power to examine the alleged error in fact. See 3 Cranch, 79.

The next question is, has there been an error in fact? The first question presented is, Is the wife capable of being a depositary of the husband's will, under the latter act of 1784? The second is, Does the finding of the will in a drawer of a bureau, in the dwelling of the husband, and probably in this case in his bed chamber, and where the wife kept her money and jewels, and which was constantly kept locked, and the place pointed out by the husband for the depositing, comply with the requisitions of the act, as to the will being found among the valuable papers or effects of the deceased? 3d, Is a will, all written in the hand writing of the devisor, except the signature of the name of one attesting witness (there being but one), a will in the hand-writing of the devisor, within the meaning of the said act? 4th. There being one subscribing witness, can it be offered as a will under the latter act of 1784? 5th. Being heretofore proven by one witness, can it now be proven in the manner pointed out by said act? There is an union of interest as well as of person between husband and wife, and the will, governing this united person, resides in the husband, and from this union follow many consequences. They cannot contract, they are but one; they cannot give to each other, for the same reason; the wife cannot bind or affect their joint property, or even her own freehold lands, without the consent of her husband; for this requires will, and she has none; (I speak not

of her powers in a Court of Equity, and particularly (393) where sne has separate property ;) and a number of other cases might be put as following from this union ; but where the acts affect not the rights of the husband, as husband, she is considered as a human being, and having a human existence; she is capable of contracting as agent of the husband, and her purchases or contracts bind the husband as his agent only, and not as wife, for in the latter capacity she cannot bind him; she may perform a confidential trust for the husband, as attorney or friend, because in this there is nothing incompatible with her character as wife, or that union of person and interest which exists between them. Nor is it an objection, that during the life of the husband, she cannot be a witness as to the deposit. No evidence of that, is or can be required during his life; after his death she is as competent as any one; if then rejected, it must be on the score of interest or infamy, as others are liable to be. But allowing that she could not be a witness to prove the deposit, the same situation would be produced by the death of any depositary during the devisor's life, and this I apprehend would not annul the will. I can see no reasons for disallowing her to be a depositary, but many peculiar reasons for allowing it. I think, also, the place where it was found was among *his* valuable effects, if the wife could not be a depositary, for then it was his desk, his money, his jewels, and the key was kept by him by the hands of the wife; whether taken out of the drawer was a question of fact. As to the third objection, that it is not a will under the act of April, 1784, there can be no weight in it. The signature of subscribing witnesses is no part of the will. The witnesses put their names there to be enabled to identify the paper, and where the law requires subscribing witnesses, it is for the same purpose. Originally the witnesses did not put their names to the paper, but *hiis testibus* was added by the parties concerned, that they might know on whom to call in case of a dispute. The will is not certainly worse by having one subscribing witness; it will certainly answer the pur- (394) pose of more certainly shewing that this is the paper which she saw deposited in the bureau; going beyond the requisitions of the act, in respect of proofs, certainly cannot annul that which comes up to them. I think the fourth objection has been already answered. I can see no reason for the fifth, for its probate as a will of goods does not im-

peach it as a will of land, and were I to express an opinion upon the third, fourth, and fifth objections, it would be, that if they have any effect upon the law of the case, which I think they have not, they would go to support, and not to destroy, the will. I think the Judge erred in refusing a new trial, and that there must be one.

TAYLOR, Chief-Justice, and HALL, Judge, concurred.

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## GREGORY *v.* HOOKER'S ADM'R.

*From Halifax.*

The personal representative of a deceased person, is not liable to pay for the funeral expenses of the deceased, unless he contracts for them or subsequently promises to pay for them—there is no *implied* promise to pay for them.

Where an individual, of his own mere motion, buried a deceased person, and without giving notice to the administrator of the expenses, sued him, he was not allowed to recover.

A count against an executor, charging him upon his promise as executor, may be joined with a count upon promises of his testator.

Where, on the division of an intestate's slaves among his children, an allotment is made to A. greater than that to B, another child, and to equalize the division, A is directed, out of his share of the property, to pay a certain sum to B, this gives B. a lien on the slaves for that amount; and if A's administrator sell the slaves alloted to A. before such payment is made to B. the balance only of the purchase money will be assets in the hands of the administrator, after the sum directed is paid to B.

The declaration in this case contained five counts. The first was on an implied promise of Defendant's intestate to pay Plaintiff for board, &c. The second was in *inde-*
(395) *bitatus assumpsit*, laid on the promise of the administrator as such. The third was a count *quantum valebat*, laid on the promise of the administrator as such. The fourth was a count for funeral charges against the Defendant as administrator, laying the promise to have been made by him as such. The last count charged, that in consideration the Plaintiff would give her note to the Defendant for a debt due him as administrator, he, as administrator, promised he would set it off against so much of her account against the intestate, and then alleged a breach of the promise, by compelling the Plaintiff to pay the note, which increased the amount of his assets.

The plaintiff, on the trial below, produced in evidence, an account for board of the intestate and of his servant during

his lifetime, and for keeping and feeding intestate's horses, which was admitted: there were also in the account, the two following charges, viz.: "To making sheet and pillow case, £0 5 0—To one pillow furnished him when deceased, £0 5 0." To establish these charges, the plaintiff proved that the intestate, Dr. Hooker, died at her house; that he was buried before administration granted, and that after his death she rendered the services, and furnished the pillow for his funeral. There was no evidence of an express promise by the administrator to pay the funeral expenses.

The defendant, in support of his plea of fully administered, produced an order of the County Court of Tyrrell, to divide the negroes of Stephen Hooker among his distributees, and appointing several persons therein named to make such division, and a copy from the records shewing that such division was made; from which, it appeared that the negroes assigned to defendant's intestate, exceeded his dividend of personal estate by $174, and by the return he was directed to pay that sum to his younger brother: the defendant then offered to the jury the receipt of the guardian of the younger brother for $174, dated before this suit (396) was brought, to shew an expenditure of assets to that amount: the Court would not permit it to be read, on the ground that the testimony of the guardian was better evidence. The defendant also contended, that as the sum of $174 was due from the intestate on the partition of the negroes, and that as two of the negroes divided were sold by the administrator after the death of the intestate, the administrator should not hold said sum as assets, but was bound to pay it to the younger brother, who had a lien on the negroes to that amount. The Court ruled that the whole value of the negroes was assets. The defendant pleaded outstanding bonds at the time of the plaintiff's suit brought, and proved a number of bonds outstanding. The Court instructed the jury that, although there might not be assets to pay bonds, that the administrator was bound to pay the plaintiff the ten shillings for the funeral charges in preference to bond debts, and that, if they believed the articles were furnished for the funeral, that they would find assets to the amount of ten shillings to pay said funeral charges; and the jury found accordingly. It was admitted there were assets to satisfy the funeral charges, provided they were entitled to priority of bonds.

GREGORY *v.* HOOKER.

A new trial having been refused, defendant moved in arrest of judgment, for misjoinder of counts on promises of the intestate, with a count on the assumpsit of the administrator: this was overruled, and defendant appealed.

This cause was argued at great length by *A. Henderson, Seawell, Ruffin* and *Hogg*, for the appellant, and *Gaston* and *Mordecai*, for the appellee.

For the appellant.—It is not necessary, in this case, to deny the duty of the administrator to bury the deceased: it may be remarked, however, that it is at best but a duty of imperfect obligation, rather encouraged than enjoined. (397) If he bury the deceased, he is allowed the necessary expenses out of the assets; if he omit it, it has not yet been shewn that he is liable, either civilly, or on a criminal prosecution. The rites of sepulture are readily afforded to the dead by the piety of the living; and it has not yet been found necessary to add the sanction of the law. But admitting the duty of the administrator to be the burial of the dead; and admit that he is bound to pay funeral charges, yet no other person can pay them, and compel him to repay. No one can make another his debtor without his assent. Unless there be a previous request, or an express subsequent promise, no action arises. Although the administrator may pay funeral expenses, and retain for them, yet it does not hence follow that any one who pays them can make him a debtor therefor. The articles here were furnished at plaintiff's peril. One parish, for instance, cannot recover from another, for necessaries furnished a pauper, during illness, by the former, nor for funeral expenses of a pauper belonging to the latter parish. *Atkins* v. *Barnwell*, 2 East. R., 505. There must be an express promise. A moral obligation is a good consideration for an express promise, but never raises an implied one. 1 Selw. N. P., 66, 67; *Wennal* v. *Adney*, 3 Bos. & Pul., 247. The very able note of the Reporter, in this last cited case, demonstrates that a *legal liability* is a good consideration for an express promise only. If the law be, that any one may perform the duty of an administrator, and a contract will thereby be raised without the assent of the administrator, it must also be law, that one may maintain the slaves, and pay the debts of the deceased, and support assumpsit for these several acts: it cannot be that a rational or legal distinction exists between goods furnished for a funeral, and

goods purchased for it; or between monies expended for such goods, and in the payment of debts. If the contract be implied in one case, it can be in all: the difference is in form only, not in substance. The doctrine contended
(398) for by the plaintiff in this case, will, if traced to its results, be found to leave an administrator the name of an office only, the duties of which may be usurped by any one at pleasure. An individual has, by law, in ordinary cases, a right to contract with a substitute to perform his duties, or not; and this discretion is necessary for his own safety, and the faithful performance of the duty: it is, then, a strange anomaly in the law, if such choice be denied him, when he takes upon himself a sacred and responsible trust, and acts for creditors and distributees.

If there be in this case a *legal* remedy against the administrator, it can only be enforced against him after qualification; for until then there is no obligation imposed: and if it be said, his duty is to have a retrospective operation from necessity, then it should appear that he *had notice* of the payment of these funeral charges, had then assets, and refused to pay. The plaintiff, in this case, may have done a *personal favor* to the defendant: but this action cannot be sustained without the *express* promise of the defendant. Skinner, 274, pl. 2 Carth., 104, viewed in connection with Toller, 19.

The necessity of an *actual* contract to support this action, is apparent from the pleadings in *indebitatus* assumpsit. In In all *indebitatus* counts, except for money had and received, it is usual and proper to set out a *debt* on request, and if the request were not stated, it was formerly ground of error. *Wallis* v. *Trott*, 1 Stra., 88. This rule is now relaxed, and the omission is not material, because the *assent* to the contract, on the performance of which the promise is implied, must be proved; and it is sufficient in the declaration to state a contract, which *ex vi termini*, includes an assent, and the law will presume the promise. In the count, for money had and received, the act itself shews an assent; and hence it never was necessary to set forth a request. Lawes on Pleading in Assumpsit, 87, 435; 1 Chitty Pl., 322; Precedents in indeb. ass. in 2 Chitty; 3 Johns., 434; 8 Johns., 436.

(399) This declaration contains counts which cannot be joined. 4 Term R., 347.

For the appellee.—Two questions are presented in this case; first, was the defendant under a legal obligation to pay the funeral charges of his intestate? If he was, he is bound to the plaintiff to the amount of the articles furnished, and labour done by her. There is a fallacy in the argument, on the other side, which arises from supposing that we declare, not for having buried the intestate, having actually furnished the necessaries for the funeral, but for having *paid those who did*, and seeking, without a promise, to recover the money. Is then the administrator liable to us for *our* services? The administrator is bound (not morally, but *absolutely*,) to pay the funeral charges out of the assets of his intestate. Richardson's Executors, 381; 2 Bl. Com., 515. There can be no other mode of compelling payment, but by assumpsit against him as administrator. A promise to pay is always implied, when necessaries are furnished on the part of him, who, by law, ought to furnish or pay for them. Witness the case of repairs done by a carpenter to a ship, with the knowledge of the owner—of medicines provided by an apothecary for a daughter—fees of officer due on admission to any honour. Com. Dig. "assumpsit," 133. So assistance to a pauper, raises an implied assumpsit against the parish. *Wednall* v. *Adney*, 3 Bos. & Pul., 253. In the case of an executor, the suit can be brought against him as executor only, because he is liable *de bonis intestati*. The law here raises the assumpsit, because of the administrator's legal liability. There is no necessity for an *express* promise—nor is an express promise ever more binding than the promise which the law raises: for if there be a duty and a consideration, the law raises a promise; if no duty and no consideration, an express promise is void. The only exceptions to the rule, are cases where there has been a consideration, but (400) the legal obligation has been defeated; then, though no promise can be implied, an express promise will be valid. *Wednall* v. *Adney*, 3 Bos & Pul., 251, in note.

But it has been said, that although the administrator may be permitted to *retain*, when he makes advances for the funeral, yet he is not bound to pay when another makes the advances. The answer is, that he can only retain in cases where, if he were not administrator, he might sue. The case of *Atkins* v. *Barnwell*, 2 East., 505, on which the other side relies, was decided on the ground that there was no legal obligation on the defendant. The case of *Wednall* v. *Adney*,

goes on the ground of a want of legal obligation on the master to provide medicine for his hired servant The opinion of the Chief Justice is in our favor. "I have no doubt that parish officers are bound to assist when such accidents happen; and the law will raise an assumpsit against them, to enable any person who affords the immediate assistance the case may require, to recover the amount expended."

The case of *Watson* v. *Turner*, which is cited, (3 Bos. & Pul., 250,) was decided in favor of the plaintiff, because of the legal obligation, and the express promise was unnecessary. The case of *Scarman* v. *Castell*, 1 Esp. Rep., 270, presents only the question as to the legal liability of the master. There was no express promise by the master, nor any previous request proved. They were implied from his legal liability.

The objection, that no person shall make another a debtor against his will, does not apply: for no *dissent* appears, and the *assent* is an implication of law

The second question is, as to the joinder of counts in the declaration. The criterion of determining, is this—where the same plea may be pleaded, and the same judgment given; or where the counts are of the same nature, (though the same plea cannot be pleaded), and the same judgment (401) can be given,—actions may be joined. 1 Chitty Pl. 197, 2 Saund. 117 c. n. 2.—Bacon, actions in general; Com. Dig. "Action" G.—*Brown* v. *Dixon*, 1 T. Rep. 276, 277. A count on a promise of testator, and on such a promise of executor as only charges him *de bonis testatoris*, may be joined. 1 Chitty, 205–6; 2 *Ibid.* 60, 61; 1 H. Bl. 182; 10 East. 313; 8 Johns. 440.

The proper rule is, that where all the demands are payable out of, or go to increase, the same fund, the counts may be joined. 2 Lev. 165; 3 *Ibid.* 60, 1 T. Rep. 487, 4 T. Rep 281, 6 East. 404, 1 Taunt. 322.

TAYLOR, Chief-Justice.—The heavy costs accumulated by a protracted litigation, have made this suit very important to the parties; and though the two *items* for funeral charges amount together to but ten shillings, yet whether the Defendant be liable to pay them, depends upon principles which are not to be understood without some research. I must own that the argument, which has been able on both sides, has presented the subject in many lights which were new to me;

and, together with my own reflections, has produced an opinion altogether different from what I have ever entertained on the subject. Notwithstanding the reasons drawn from propriety and decency, tending to shew the Defendant's liability, the only enquiry I have permitted myself to make, is, what is the Law? My enquires have ended in believing that it is in favor of the Defendant.

Of the two classes of contracts, express and implied, this cannot belong to the former, since there was no debt owing from the intestate, and no engagement entered into by him. Does it belong to the latter? It is said that it does, because the Defendant was subject to a legal liability to pay this debt, and that, in every such case, the law implies a promise. His liability is inferred from the language in which the duty of an executor or administrator is stated in the elemen-
(402) tary books, with regard to the payment of debts.

"Funeral expenses, according to the degree or quality of the deceased, are to be allowed of the goods before any debt or duty whatsoever, for that is *opus pium et caritatis.*" 3 Inst. 22. "He must observe the rules of priority in the payment of the debts; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate, and first he *may* pay all funeral charges." 2 Bl. 511. "The expenses attending the funeral shall be allowed in preference to all debts and charges." Toller 191. These writers, and all others, I believe, make a distinction between debts and funeral expenses: This position is warranted by them, that if the administrator or executor pays debts of inferior dignity in preference to those of a superior dignity, of which he has notice, he shall be liable to the latter *de bonis propriis.* Funeral expenses are not a debt, but properly a charge upon the estate; and if the executor voluntarily pays them, he shall be allowed such payment before all others, because it is a work of charity and piety.

I know of no case, where an administrator is liable in his representative character, on any contract not made by the intestate; for if he is sued on a contract made by himself, though relative to the to estate of the intestate, the suit must be in his own right. Declaring on an *insimul computassent* against an administrator, as such, is not an exception to the rule, for that raises no new debt, but is merely an acknowledgement of the old one. He is liable as far as he has assets,

for the debts, covenants, and contracts of his intestate, although the cause of action accrue not till after the death, as, on a bond or note which became due after that event; but there the duty is created by the intestate. But if the duty arise after the death of the intestate, the administrator is liable in his private capacity. For rent in arrear in the testator's lifetime, his representative is liable in that character, and can be sued only in the *detinet*, and may (403) plead, fully administered; whereas, for the subsequent rent, he is personally liable. Comyn's Digest, "Administration," 14, B. So if he promise to pay a debt, in consideration of forbearance or of assets, he must be sued in his individual character; the law guarding with caution its principle, that if an administrator is liable beyond the assets, it must be for his own act, sustained by a proper consideration.

But, admitting for the present, that there is a legal liability on the Defendant, and that the Law therefore implies a promise, (which I shall presently shew not to be the case,) it may be asked, what has made the Defendant a debtor to the Plaintiff on these charges? The Defendant's intestate was not buried by the Plaintiff, or at her expense, and besides the sheet and pillow, there must have been other articles suitable to the sphere and condition in which Dr. Hooker had lived, and which doubtless were furnished before the state of the assets was ascertained. Every individual who furnished any one article has the same right to sue with the Plaintiff, and to demand payment from the Defendant in preference to creditors. A man is legally liable to pay his own debts, and the Law implies a promise to his creditor that he will do so; but if another, voluntarily and unasked, pays the debt, the Law does not imply a promise to him. In such case, assumpsit will not lie without an express promise to repay it, for the debtor may have a set-off, or some good reason to resist the payment, and another person shall not pay it for him, whether he will or not. It is true, that if a party derives benefit from the consideration, it will be evidence to the Jury of a previous request; as if a man pays money or buys goods for another, without his knowledge or his request, and he afterwards agree to the payment or receive the goods. But in this case, there is no reason to believe that the articles charged were furnished with the (404) knowledge of the Defendant, of course his assent

cannot be implied. The principle, that as the charge accrued subsequent to the death of the intestate, the Defendant is not liable in his representative character, is, as I conceive, fortified by a case I have met with since the argument, wherein it is laid down, "that an executor is not liable to pay for funeral expenses, unless he contracts for it." *Aston* v. *Sherman's ex'r*, Holt's Rep. 309. The case is quoted with apparent approbation, by 1 Com. on Contr. 529, who states the reason of the decision to be, that such a charge, if sustainable against an executor, would make him liable *de bonis propiis*. In other words, as neither debt nor duty was created by the testator, if the right to sue the executor, as such, were admitted, it would follow, that he would be liable to pay for funeral charges, whether he had assets or not; but as the law will not so charge him without his own act and consent, it gives no remedy to a party voluntarily performing the service. As on this ground I am satisfied there ought to be a new trial, I have thought it unnecessary to give an opinion on any other points raised in the argument.

HALL, Judge.—The defendant's intestate was never debtor for the amount claimed by the plaintiff for funeral expenses; and if the defendant is liable, he became so after the death of his intestate, and if he became so after the death of the intestate, it was by the act of the plaintiff, who furnished the the articles for the funeral from her own mere motion, and not at the request of the defendant; if so, he ought to have been acquainted with that fact prior to the commencement of this suit, otherwise he will be subjected to costs without having been guilty of any default, or improper conduct. It is not like the case where the administrator is sued for a debt due by his intestate, of which, until suit is brought, he had no knowledge. In that case, his intestate might have been sued, and his death neither places the plaintiff
( 405 ) in a worse, nor the defendant ( his administrator ) in a better situation than he himself stood in before his death.

I entertain the opinion, that the counts in the declaration are properly joined, and that the amount due by the intestate, on a division of his father's estate, is not assets in the hands of his administrator, and that the rule for a new trial should be made absolute.

HENDERSON, Judge.—This action is brought in part for a pillow and winding sheet furnished to bury the intestate of the defendant, without his previous request, subsequent promise, or plaintiff's giving notice of the charge before action brought; and I am decidedly of opinion, that that part of the case cannot be supported; and I will examine the consideration, whether those acts, being done by a stranger, for no one, and at the request of no one, but for the purpose of interring the dead, are not in Law mere acts of charity and humanity, which create no debt or legal duty; but I am satisfied by reason and analagous authority, that before an action can be sustained, notice must be given the executor or administrator. Where one person officiously pays the debt of another, an action cannot be supported on such officious payment, (for no person can make another a debtor without his consent;) but it may be admitted that the intestate dying at the house of the plaintiff, and there being no administrator to bury the corpse, the act of the plaintiff was not officious, but certainly notice of the performance of the duty must have preceded the suit, for until notice, the defendant was put in the wrong, and it would be contrary to all our notions of justice, to subject a person to an action and its consequences, without a wrong committed by the defendant, or the person whom he represents. The consequence of doctrine contended for by the plaintiff, would in such cases lead to this, that an administrator or executor, who was not on the spot, might be liable to many different persons one might furnish the plank to make a coffin, another (406) the nails or screws, another the lining, another the ropes, another the pillow, another the shroud, and so on, perhaps, to the number of twenty, and if one could support an action without notice, so might each one; but the Law is not so unjust. Where the liability of a person arises from an act of which he is not bound to take notice, or where the knowledge rests more peculiarly with the plaintiff, there notice is necessary. An administrator or an executor is bound to know so far as to be liable to an action for the debts of the intestate or testator, for he is his privy, he represents him; but the assignor of a negotiable note is not bound to take notice of the omission of the maker to pay the assignee upon demand; he must have notice before suit; it must be laid and proven, because the omission to pay is more peculiarly known to the assignee, who has failed to

get payment: so here the services are more peculiarly known to the person performing them, than to the administrator. For these reasons, I think the charge for funeral expenses cannot be sustained. I differ from the presiding Judge below, upon the question, whether the difference due from the intestate, on the division of the negroes among the children of his father, is assets; in other words, whether the negroes allotted to him are assets to their full value, or with a deduction of that sum. I think it formed a charge upon the negroes to that amount. The charge was made by the commissioners, without the agency of the other children; their property, to the amount of the difference, was taken from them by men acting under the authority of the Law, and the Law would never take from them property, and give them only the personal liability of the person to whom the more valuable lot was awarded; and the law which takes from them the possession of their property, gives them the most ample security; in fact, so much in value of the negroes, is theirs, and nothing but the impossibility of dividing them, converts that property into a charge upon the negroes, together with a debt upon the child, for
(407) he takes them *cum onere*. Suppose the Sheriff, standing by when the division is made, with an execution to the full amount of all that child's property, and the moment the division is made, he levies on the negroes so allotted, and applies them to the discharge of the execution; and if the opinion below is right, such, I think, would be the consequence. I think there is no misjoinder of counts. It is perfectly settled, that you may join a count against an executor, charging him upon his promise as executor: that is, to pay out of the assets, with counts upon promise made by his testator; in each case, the executor is liable in his representative character: that is, out of the assets. It is true, the precedents furnish only cases where the testator gave birth to the obligation, or received the consideration of the promise, but the reason of the thing applies to all obligations thrown upon the executor by virtue of his office; and if in this case the executor was liable to pay the funeral expenses out of the assets, without a precedent request or subsequent promise, or had specially promised to pay out of the assets, the judgment would be *de bonis testatoris;* and although the testator could not have received the consideration of the promise in case of funeral expenses, yet in this view of the

case, the executor is performing a duty in his character of executor, (to say the least,) which the Law tolerates by enabling him to retain for the expenses of them. As, therefore, the plaintiff might have made out such a case as would have supported the count, and if she had, the judgment would have been the same as in the other counts, I can see no reason for arresting the judgment.

(408) LOCKHART *v.* HARRINGTON.

*From Anson.*

The power of limited taxation for county purposes, is necessarily confided to the several County Courts; and its exercise is no invasion of the Bill of Rights.

This was an action of debt brought on a penal bond, the condition of which, was, that, whereas the Plaintiff has taken into his possession, by distress, a horse the property of the Defendant, to satisfy the amount of a tax levied on the property of the Defendant, for the purpose of defraying the expenses of building a new court-house in the county; if the Defendant should deliver the horse to the possession of the Plaintiff on a certain future day, then the obligation was to be void. The breach assigned, was, the non-delivery of the horse. The Defendant, among other matters of defence, contended that the bond was illegal, as being contrary to the 16th section of the Bill of Rights, which declares, "that the people of this State ought not to be taxed, without the consent of themselves, or their representatives in General Assembly, freely given." A verdict passed, and judgment was rendered against the Defendant below; and the only question presented by his appeal, was, had the County Court of Anson the right and power to lay the tax referred to?

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The only question made by this record, is, had the County Court a right and power to lay a tax for building a court-house? This question is answered, as to the power, by the several acts of 1741, c. 33, of 1795, c. 433, and 1816, c. 911, which confer its exercise on the County Courts. There (409) is no ground for the constitutional objection; for the people of the State have not "been taxed, without the consent of themselves, or their representatives in General As-

sembly, freely given." Where a tax is to bear on all the citizens of the State, or on all the property of the State, for general and public purposes, the Legislature can best judge of the amount to be assessed, and of the proportion in which it ought to be collected; and this power they have accordingly exercised themselves, without exception.

But the County Courts can best judge of the public local wants of their respective counties, and the resources of their citizens; and, as these vary with almost every county in the State, the power of limited taxation is necessarily, and most conveniently confided to them. Without it, it would be difficult, if not impossible, to conduct the affairs of the State; and its undisputed exercise for nearly a century, amidst a people watchful of their rights, and never backward in resisting a lawless power, is a strong proof, not merely of its benefit to the community, but of the correctness of its principle. After an acquiescence so complete, no Court would declare an act unconstitutional, with any evidence short of that producing perfect conviction.

(410) HERRIN *v.* MCENTYRE.

*From Burke*

A covenant of general warranty is subject to the same construction that a covenant for quiet enjoyment is; and when the *habendum* in a deed is to a man and his heirs forever, he may recover for an eviction, on such general warranty, though the clause of warranty should not mention to whose benefit it enures; for it shall be intended for the benefit of the person to whom the conveyance was made.

A. purchases a tract of land, and sells it to B: B. is evicted by a better title. As soon as this fact is satisfactorily ascertained by A. he may immediately make compensation to B, and sue his own vendor, without any recovery at law by B. against him.

This was an action brought upon a general covenant of warranty in a deed; and the Plaintiff assigned as a breach, an eviction by paramount legal title.

The Plaintiff, on the trial below, produced the deed of the Defendant, dated 30th of June, 1808, conveying to the Plaintiff a tract of land, "to have and to hold to the said Abraham Herrin, his heirs and assigns forever; and the said Thomas L. McEntyre doth, for himself, his heirs, executors, administrators, and assigns, warrant and forever defend the said land and premises from all manner of persons whatever, laying claim thereto." Plaintiff then shewed that he had conveyed

a part of the land to one Nance, and the residue to one Thompson, and that a recovery in ejectment had been obtained against them by one Carson and another, and they had been turned out of possession by a title superior to that made by the Defendant to the Plaintiff. Plaintiff then proved that he had made compensation to Nance & Thompson, for the injury they had sustained. The Defendant contended that the deed contained no covenant for quiet enjoyment to the Plaintiff; and that if it did, Plaintiff could not recover thereon, until Nance and Thompson had recovered of him on his warranty to them. The Court informed the Jury, that
(411) the deed did contain a covenant for quiet enjoyment by the Defendant to the Plaintiff, and also that the pleadings in the cause did not raise the other legal objection made by the Defendant; but if the pleadings had been proper to raise the question, it would not have availed the Defendant, for the Plaintiff had a right to commence his action as soon as those claiming under him had been evicted by title paramount. Verdict for Plaintiff, new trial refused, judgment, and appeal.

*Wilson*, to shew that the warranty, though it did not mention to whom it was made, enured to the feoffee, cited Co. Lit., 383 *b.*, 384 *a.*; 7 Bac., 228; Dyer, 42.

TAYLOR, Chief Justice, delivered the opinion of the Court:

This action is founded upon a covenant of general warranty, which is subject to the same construction with a covenant for quiet enjoyment; and it is essential, in this action, that the plaintiff assign as a breach, an ouster or eviction, by a paramount legal title. It is stated in the declaration, that Nance and Thompson, tenants in possession, under the plaintiff, were legally ejected; and the case more particularly specifies, that the plaintiff had conveyed the land to those persons, who defended the ejectment on the strength of his title. Two objections are made to the plaintiff's recovery; the first, that the deed from the defendant contained no covenant for warranty or quiet enjoyment to the plaintiff: secondly, that if it did, the plaintiff could not recover until Nance and Thompson had recovered from him. The premises of the deed declare, that the defendant has sold to the plaintiff a fee simple estate; and the *habendum* limits the said estate to the plaintiff, his heirs, executors, administra-

tors and assigns forever; but the clause of warranty does not express to whom it shall enure. The ordinary rules of construction would seem sufficient to remove this diffi-
(412) culty; as it is the nature of a warranty to run with the estate; but Coke states the case, "though in the clause of the warranty it be not mentioned to whom, &c., yet shall it be intended to the feoffee." Co. Litt., 384. The objection, therefore, cannot prevail. There is nothing conclusive in the recovery of the land by ejectment, as against the defendant. He was still at liberty to controvert the title of Carson and the other plaintiff in the ejectment, and shew, if he could, that their title was not superior to the one he sold. It cannot make any difference to him, therefore, whether Herrin chuses to stand a suit or not. The only consequence would be, an increase of costs, which he must ultimately pay. The plaintiff had a clear right to pay the money, as soon as the eviction by a better title was ascertained to his satisfaction, and to bring this suit immediately afterwards. A new trial is refused on both grounds.

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LOCKE *v.* ISAAC ALEXANDER AND CHAS. T. ALEXANDER.

*From Cabarrus.*

An attorney, acting for his principal, should perform the act *in the name* of the principal.

Mesne profits during the enjoyment under a defective title, cannot be set-off against the claim of interest upon the purchase money, because the possessor is liable to the rightful owner for them. But where it appears that the possessor has enjoyed the lands, and cannot be called to account for the mesne profits, the reason of the rule ceases, and it does not apply.

This was an action of *covenant.* On the 10th of May, 1810, the defendant executed to one Merrill, an instrument of writing, which, after reciting that the defendants acted in the execution of the instrument, in their own behalf, and as attorneys in fact for John Springs and Sarah his wife, John
(413) M'Coy and Catharine his wife, and Cunningham Harris and Mary his wife, witnessed, that the defendants, "*as attorneys aforesaid,*" received the consideration money, and conveyed to Merrill in fee simple, certain lands, and all the estate, right, title, interest, claim and demand and property of the said defendants, "*as attorneys aforesaid,*" of, in, and to the said lands. The conclusion of the instru-

ment was as follows: "and the said Isaac and Charles T. Alexander, as attorneys aforesaid, for themselves and their heirs, the aforesaid lands and premises, and every part thereof, against them and their heirs, the claim or claims of all and every other person or persons whatsoever, to the said Jonathan Merrill, his heirs and assigns, shall and will forever warrant and defend, by these presents. In witness whereof," &c. The paper was signed and sealed by the defendants in their own names, and not as attorneys. The power of attorney was as follows:

"Know all men concerned, that we, John Springs, Cunningham Harris, and John M'Coy, joint heirs with Isaac and Charles T. Alexander, of the estate of Evan Alexander, deceased, have made, constituted and appointed, and by these presents do make, constitute and appoint the above named Isaac Alexander and Charles T. Alexander, our true and lawful attorneys, for us and in our names to lease, let, sell or demise all or any part of the real estate of the aforesaid Evan Alexander, deceased, to such person or persons, and for such price or sum of money as they may in their judgment think fit, and to make and execute titles for the same absolutely in fee simple:—and also in our names and on our behalf, to seal, execute and deliver such deeds, conveyances, bargains and sales, for the absolute sale or disposal thereof, with such clauses, covenants and agreements to be therein contained, as our said attorneys may think fit and expedient, and we do hereby ratify and confirm all such deeds, conveyances, bargains or sales, as shall or may hereafter at any time be made, sealed and executed by our said attorneys, touching or concerning the above named premises. In witness," &c.

Merrill conveyed his interest to the plaintiff, and after the death of Springs and Harris, in 1816, both of whom, in right of their wives, had a life estate, the plaintiff was turned out of possession of three fifths of the land mentioned in the deed. The plaintiff was in possession and enjoyed (414) the mesne profits, until the death of Springs and Harris. The case, by consent of parties, was considered as being between Merrill, plaintiff, and the Alexanders, and the record amended accordingly. On the trial below it was contended, that Merrill could recover no more than the value of the *life estate* of M'Coy, Springs and Harris, as nothing more was conveyed; but the Court held that the plaintiff was entitled to the value of the fee simple.

It was further objected, that as Springs and Harris had permitted Merrill to remain in the use and occupation of the land, from the date of the deed until their death, he was entitled to no damages during that period. The Court instructed the jury to ascertain the value of the fee simple of the land at the time of the sale, and to give interest thereon

up to the rendition of judgment. The jury did so. A new trial was moved for and refused, and defendants appealed.

*Wilson* for the appellants, contended, that interest on the value of the land should not be computed while plaintiff was in possession, for he would then have both interest and mesne profits. That defendants were liable, having signed the deed, was admitted, but they were liable only to the extent that the persons for whom they acted would have been liable; they have done nothing more than convey the title of Springs and Harris. The *habendum* in a deed cannot give any interest to a person not named in the premises. 3 Bac. "Feoffment," C.; Co. Lit., 6 a. The *habendum* cannot retract a gift mentioned in the premises, but may explain it. Lit., 21 a.; 3 Bac., 151; Cro. Jac., 282. If an estate for life is created, and a general warranty in fee simple, the warranty does not enlarge the estate. Co. Lit., 385, a.

*A. Henderson, contra.*—The deed shews clearly that a fee simple was intended to be conveyed, and whether the
(415) defendants, as attorneys, had a right to convey a fee simple or not, must be collected from the deed by those who might wish to purchase: there is nothing in the deed to shew that only a life estate was intended to be conveyed. Defendants have made themselves personally liable by the deed; although they profess to act as attorneys in fact, they having signed their own names. 2 Wheaton, 55–6, note; 6 Term Rep., 176. In executing a deed as attorney, the proper mode is to sign the name of the principal. 2 East, 142; 5 East, 148; 4 Mass. Rep., 595; 8 *Ibid*, 162

As to the damages, they are given correctly. 3 Caine's Rep., 111; 9 Johns., 324; 2 Wheaton, 62–3–4, note.

HENDERSON, Judge.—This case presents difficulties to the Plaintiff's right of recovery on the merits, and I am not prepared to solve them. It is very doubtful whether any thing, as between the parties, passed by the deed. In the first part of the premises, it is said to be a deed between Isaac and Charles T. Alexander, in their own behalf, and as attorneys for Springs, Harris and M'Coy, in right of their respective wives (naming them) of the one part, and Jonathan Merrill of the other, and witnesseth, that the said Isaac and Charles T. as agents and attorneys as aforesaid, in consider-

ation of two thousand dollars, to them as attorneys as aforesaid, paid by Jonathan Merrill, bargain and sell the lands mentioned in the deed, and all their right, title, and interest as attorneys: in the waranty or covenant for enjoyment, they act in their own behalf, as well as attorneys; and they execute the deed in their own names, and not in their characters of attorneys. Attorneys are the mere instruments of their principals: the principals act by them, and the act, to be the act of the principal, must be done in his name: this deed is the act of the Alexanders, not of their principals; the attorneys are not the instruments of their principals, but the actors in the transaction; nor does this reasoning at (416) all conflict with the opinion of this Court in the case of *Potts and Lazarus*. It was there decided, that the agent was not bound; but it does not necessarily follow that the principal was. If the principal is not bound, it is a strong argument to shew that the agent was intended to be bound; but in this Court, a Court of Law, we look at what the parties really did, not what it is probable they intended to do; and as to the deed's passing the interest of the Alexanders, the whole of the granting part, and the receipt of the consideration money by which the use was to be raised, is in the name of them as attorneys, not in their individual names or rights. It is therefore matter of great doubt, whether any thing, even as between the parties, passed, either the interest of the principals or of the attorneys; and if the covenant is a dependent one, it falls to the ground with the interest it was intended to warrant, defend, or protect. It is the common doctrine of warranty, that it is annexed to, and dependent on the estate; that it ceases with it, and the Plaintiff, Locke, must have himself considered this as annexed to the estate which pas ed with it from Merrill to him, otherwise it is a mere chose in action, and incapable of an assignment, and if so, the action cannot be sustained in his name; and it appears to me, that it would be doing violence to the acts and intention of the parties, as well as contravening the rules of the Law, to construe this a mere personal covenant; it is plain, from the face of the deed, that some interest in the lands was recognised in Springs, Harris and M'Coy, in right of their wives; and it is quite evident that the parties intended to pass that interest; and that interest passing, the Alexanders were willing to bind themselves personally that Merrill should quietly enjoy the land; for they had no fears that he would be disturbed

by any other title, or were willing to risk the others. Now to bind them to defend against a title which all parties thought the deed had vested in Merrill, would be (417) contrary to every principle of justice. These, among other reasons, should induce the Court to lean in favor of *construing* it a dependent, and not an independent covenant. But at any event I think the charge wrong upon the question of interest. Mesne profits, during the enjoyment under a defective title, is not set off against the claim of interest upon the purchase money, because the possessor is liable to the rightful owner for them; they are therefore left in his hands for that purpose: but when it appears that the possessor has enjoyed the lands, and cannot be called to account for the mesne profits, the reason of the rule ceases, and the rule no longer applies, and the mesne profits shall be set off. Interest is in most cases an equitable demand, and is left to the sound discretion of the Court, but in this case it may be resisted without recourse to that maxim. It appears by the case, the Alexanders had from Springs and Harris, a power of attorney, executed to sell or transact any business in relation to these lands only; among other things, that the attorney contracted with Merrill for the sale of the lands, received his money, and put him in possession, where he remained unmolested by Springs and Harris during their lives; after their deaths, the wives ousted him; they were entitled to the mesne profits only from the deaths of their respective husbands; they had no claims to those which arose during the coverture, they belonged to the husbands. The mesne profits could not be left in Merrill's hands to satisfy their claim for them, for they had none; the husbands could have none, for Merrill was placed by act of their agents duly authorised, and they had received Merrill's money; he was there by their consent, and could not be charged as a trespasser. Nor was he liable for use and occupation, there being no contract for that, either express or implied. (See the case of *O'Neal* v. *Holcom*, decided in this Court about four years ago.) Nor can I perceive in what form of action, or upon what principle, Merrill could be subjected by the (418) executors of the husbands. I mean not to express any opinion where the possessor is protected in the enjoyment of the mesne profits, by the statute of limitations, or any collatteral defence. I therefore think the presiding Judge erred in directing the Jury to give interest upon the

whole of the purchase money from the time of its receipt; the Defendants are not subject to the interest of two-fifths of of the purchase money, until after the deaths of Springs and Harris, respectively. Let a new trial, therefore, be granted.

HALL, Judge, concurred.

TAYLOR, Chief-Justice.—I concur for making absolute the rule for a new trial, on the score of damages. I desire to be understood as giving no opinion on the effect of the covenant generally.

*Vide* post. Vol. 2, page 155—S. C.

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TATE *v.* O'NEAL et al.

*From Wilkes.*

Some degree of discretion in the punishment of slaves, is necessarily allowed patrols.

If, in the exercise of this discretion, they inflict punishment, they are not liable in an action to the master, unless their conduct clearly demonstrates malice against the owner.

This was an action brought against the defendant and two others, for beating the slave of the plaintiff. The defendants were the regular patrol of Morganton district, in the county of Burke, and finding the slave not on his master's premises, they enquired for his pass or permit from his master; whither he was going; what was his business? To these (419) question the slave returned no answer; and the defendants, together with one other patrol, composing a majority of those officers in that district, after consultation, inflicted on the slave fifteen lashes, having first made his body naked, and confined him to the whipping-post. There was contradictory evidence as to the severity of the punishment; and one witness swore that some animosity existed between the family of one of the defendants and the plaintiff.

The Court instructed the jury that the County Court of Burke had power to appoint the defendants patrols; and if a majority of them was present, and agreed, they might legally whip a negro subject to punishment; that if they found the whipping to be so excessive, as to manifest that it was not inflicted with the view of executing the law, but with the intention of gratifying malice against the owner of

the slave, such owner would be entitled to recover; but, that in ascertaining that fact, they would not examine with the most scrupulous exactness into the size of the instrument, or the force with which it was used, as some discretion must necessarily be allowed patrols; the excessive severity of the punishment must be such as a common observer would instantly perceive; that if the mode adopted by the defendants in whipping the slave, was such as masters commonly adopted, they had not acted unlawfully; and that for the purpose of whipping the slave, they might confine him to the public whipping-post; that the refusal of the slave to answer the enquiries put to him, authorized the patrol to believe he had been improperly or dishonestly occupied. Verdict for defendants, and motion for new trial; motion overruled; judgment, and appeal.

PER CURIAM.—Upon looking into this case, we find nothing, either in the charge of the Judge, or finding of the jury, to justify us in interfering with the judgment of the (420) Court below. The rule for a new trial is therefore overruled, and the judgment of the Court below is affirmed.

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STOUT *v.* WREN.

*From Randolph.*

A man shall not recover a recompense for an injury received by his own consent, provided the act from which the injury is received be lawful: but where two fight by consent, and one is beaten, he may recover damages for the injury, because fighting is an unlawful act.

The plaintiff and defendant had a quarrel and agreed to fight. After retiring for that purpose, defendant asked plaintiff "If he would clear him of the law?" Plaintiff answered, "Yes"; and defendant beat him. Plaintiff made no resistance during the beating, and, according to the testimony of some, was too much intoxicated to know what he was doing: other witnesses thought otherwise.

The Court instructed the jury, that if the plaintiff was so much intoxicated as not to know what he was doing, they ought to give him a verdict; but if he was not ignorant of what he was about, he was not entitled to recover, having assented to the fight.

The jury found for the defendant. A new trial having been refused, and judgment rendered, plaintiff appealed.

TAYLOR, Chief-Justice.—It is equally reasonable and correct, that a man shall not recover a recompense for an injury received by his own consent; but the rule must necessarily be received with this qualification: that the act from whence the injury proceeded be lawful. Hence, in those (421) manly sports and exercises which are thought to qualify men for the use of arms, and to give them strength and activity, if two played by consent at cudgels, and one hurt the other, no action would lie. But where in an action for assault and battery, the defendant offered to give in evidence that the plaintiff and he boxed by consent, from whence the inquiry proceeded, it was held to be no bar to the action: for, as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury. *Boulter* v. *Clark*, Buller, N. P., 16. The consequence of this distinction is apparent also in the law of homicide; for if death ensue from innocent and allowable recreations, the case will fall within the rule of excusable homicide; but if the sport be unlawful, and endanger the peace, and death ensue, the party killing is guilty of manslaughter.—(Fost., 259). It is laid down in *Mather* v. *Ollerton*, Comberd., 218, that if one license another to beat him, such license is void, because it is against the peace; and the plaintiff recovered a verdict and judgment.

The case was very fairly put to the jury, as to the evidence of the plaintiff's intoxication; but I think the law was misconceived in stating to them, that if the plaintiff was sober, and assented, he was not entitled to recover. There must be a new trial.

HALL, Judge.—Upon principle unconnected with municipal law, or policy, I doubt how far a person is entitled to recover damages, after having agreed to take his chance in a combat, and after the event had proved the miscalculation he made upon his own strength: considering it merely as a violation of a private right, I should say, *volenti non fit injuria*. Where the State is a party by way of indictment, the consent of the party does not stand in the way of a conviction, because the fine goes to the State for the injury done her, by a breach of the peace. However, the authority in Buller's

N. P. 16, is the other way, and I am inclined to be-
(422) lieve has policy for its support: for these reasons, I acquiesce and agree that the rule for a new trial shall be made absolute.

HENDERSON, Judge, concurred.

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## YADKIN NAVIGATION COMPANY *v.* BENTON.

*From Cabarrus.*

Some actions, local in their nature, and some transitory ones, must be brought where the cause of action arises; but with these specified exceptions, no action can be brought in a county in which neither party resides.

*Semble*, the residence of a corporation aggregate, is not to be considered co-extensive with the limits of the State.

This was a motion for judgment against a stockholder in the Yadkin Navigation Company on instalments unpaid, pursuant to the acts of Assembly. The notice required by the acts was made returnable to Cabarrus Superior Court. The Defendant admitted the service of the notice, and pleaded in abatement, that neither the Plaintiff nor Defendant resided in Cabarrus. To this plea the Plaintiff demurred, and the Court sustained the demurrer. The Defendant answered over, and final judgment was rendered against him, from which he appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The act of incorporation, authorizing the Plaintiffs to recover judgment in any Court of competent jurisdiction, renders it necessary to ascertain, whether the Superior Court of Cabarrus became possessed of it in consequence of any act of Assembly. The first act on the subject, 1777, sec. 9 and 10,
(423) provides, that where the parties live in different districts, and the debt, or demand amounts to £50, the suit shall be brought in either district at the option of the Plaintiff. Here the case states that neither Plaintiff nor Defendant lived in the county of Cabarrus; consequently, that Court cannot entertain jurisdiction of the suit. Some actions, local in their nature, and some transitory ones, must be brought where the cause of action arises; but with these specified exceptions, no action can be brought in a district, (or county) in which neither party resides. The question,

whether a corporation can have a residence in a county, so as to bring a suit there against an individual who resides in a different county, is not made in this case, and therefore no opinion is given upon it: but the notion of its residence being co-existence with the State, and being therefore competent to sue in any county, seems to be at variance with the authorities cited in 5 Cranch., 61. The demurrer must be overruled, and the suit abated.

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## DOE ON DEMISE OF HAM AND WIFE *v.* MARTIN.

*From Pasquotank.*

**An estate descends to A. from his *mother*, and from him descends to E, his niece of the whole blood. E. shall hold the estate to the exclusion of M. who is sister of the half blood to A. on the *paternal* side.**

*Ejectment.* Mary Pritchard, then wife of Thomas Pritchard, senior, died seized and possessed of the land in dispute, before the year 1795, leaving her husband surviving her, and leaving two children by him, viz: Thomas Pritchard, junior, and Elizabeth, who afterwards intermarried with William Clary. Thomas Pritchard, senior, afterwards intermarried with another wife, and had issue by her, Mary, the wife of the Plaintiff, and died. Thomas Pritchard, junior, entered upon the premises in dispute as heir to his mother,
(424) and was seized and possessed of the same until his death in 1802; he died intestate, and without issue, leaving Elizabeth P. Clary, daughter of his sister, Elizabeth Clary, who had in the mean time died intestate, leaving the said Elizabeth P. her only child. The defendant claimed under Elizabeth P. Clary.

On these facts, the Court below nonsuited the Plaintiff. Motion that the nonsuit be set aside, and new trial granted: motion refused, and Plaintiff appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The estate claimed in this case descended to Thomas Pritchard, junior, from his mother, Mary, and from him to his niece of the whole blood, Elizabeth P. Clary, under whom the Defendant claims. The Plaintiff claims in right of his wife, who is sister of the half blood to Thomas Pritchard, junior, on the paternal side. Had the question arisen between the Plaintiff and Elizabeth, the wife of Clary, it would

then have presented the same point with *Pipkin and Coor*, 1 Law Rep., 103, which was a controversy between the brothers and sisters of the whole blood on the part of the acquiring ancestor, on the one side, and the half blood on the other: but it depends on the very same principles, and is governed by the two provisos to the third clause of the act of 1784; the first, giving a preference, where intestate dies without issue, to the brothers and sisters of the half blood, on the side of the acquiring ancestor, in exclusion of the brothers and sisters of the half blood on the other side. The act, by preferring one set of half blood to the other, must necessarily prefer the whole blood of the ancestor from whom the estate descended, to the half blood of the one from whom it did not descend. This construction is unavoidable, otherwise we must suppose that the Legislature meant to put the half blood in a better situation than the whole blood. The other proviso to the clause gives the same right to the issue
( 425 ) of a brother or sister of the intestate, dying in the lifetime of the intestate, which their ancestor would have had, if he had lived. Therefore, as Elizabeth Clary died in the lifetime of Thomas Pritchard, junior, Elizabeth P. Clary stands in the place of her mother and represents her, and is entitled to the land, in exclusion of her aunt of the half blood on the paternal side. The motion for a new trial must be overruled, and a judgment entered up for the Defendant.

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**The Governor to the use of ROBERTSON & CO. *v.* MATLOCK and others.**

*From Rockingham.*

**In debt of Sheriff's bond for escape, it is proper for the jury to consider the damages really sustained by the escape; and they are not bound to give the whole sum due from the original debtor.**

This was an action of debt upon a Sheriff's bond against the defendant and his sureties; and the declaration alleged that Matlock had voluntarily permitted the escape of one Hodges, who was in custody on a *ca. sa.* at the instance of Robertson & Co. The facts, as stated in the declaration, were substantially proved before *Nash*, Judge, who instructed the jury that whether the escape was voluntary or negligent, the liability of the defendant remained the same; and should

they find for the plaintiff, that question, whether voluntary or negligent, could make no difference, as to the *quantum* of damages to which plaintiff might be entitled; that as the suit was brought for damages for a breach of the covenants in the Sheriff's bond, the plaintiff was entitled to damages in either case, only to the amount of the loss sustained in consequence of the breach; and that loss depended on the ability of the debtor to pay.

It was proved on the trial that the debtor was insol-
(426) vent; and the jury found a verdict for the plaintiff, and assessed his damage to $25. Plaintiff moved for a new trial, on the ground of misdirection in matter of law: motion disallowed; judgment, and appeal.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

That the act of 8 and 9 Will., 3, c. 2, sec. 8, was extended in practice to this State, and considered to be in force in 1777, is rendered plain by the Court Law, the 73d section of which, provides for rendering judgment in an action of debt which shall be final, "except where damages are suggested on the roll." No such practice was known at common law; for when covenants and agreements were contained in the condition of a bond, the plaintiff, upon a breach, recovered the whole of the penalty, and the defendant was driven into equity for relief. The statute of William is the only one providing for bonds with covenants or agreements in the condition; and the very great necessity for the regulations it contains, makes it difficult to suppose that our ancestors could have done without it. A Sheriff's bond for the performance of his duty, especially requires such a provision, and no breach that could be assigned under it more so than escape, in which cases of great hardship sometimes occur against the Sheriff. Taking the eighth section of the statute then to be in force, it is the settled law under it, that it is not in the power of a plaintiff to refuse to proceed according to it, in cases within the provision of the section; but that he must assign the breach of such covenant as he proceeds to recover the satifaction for; and the jury upon the trial of a cause, must assess damages for such of the breaches assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken. 2 Wils., 377.

It was proper, then, for the jury in this case to consider

the damages really sustained by the escape; and they (427) were not bound to give the whole sum due from the original debtor, as in debt upon the statutes of West., 2, and Rich., 2. The rule for a new trial must be dicharged.

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MANN *v.* VICK.

*From Halifax.*

It is the duty of public officers who are paid for their services, to furnish blanks to be executed by individuals who have business to transact with them in their official characters.

Where a prisoner, desirous of being admitted to the prison bounds, applies to the Sheriff, and offers to prepare a bond with ample security, and the Sheriff refuses to admit him to the rules, or to take any bond, such conduct on the part of the Sheriff is a waiver of any further act to be done by the prisoner, even supposing the law required him to prepare and tender a bond.

The declaration, which contained but one count, charged, that Vick, being Sheriff of Nash county, and one Ricks, his deputy, Ricks had refused to allow the plaintiff the bounds of the prison in the county of Nash, though sufficient security had been offered.

The plaintiff, to support his case, exhibited a writ of *ca. sa.* against him, returned "executed" by the defendant; and also proved by the records of the Court, that prison bounds had been laid off according to law. A witness, Arrington, then swore that he, as the agent and friend of the plaintiff, applied to the deputy, Ricks, and informed him that the plaintiff was desirous of being admitted to the bounds, and that the witness (whose sufficiency was proved), offered to become plaintiff's security. Ricks said that he did not know how to prepare a proper bond, and the witness then offered to prepare it. When about to do so, the brother of Ricks suggested some objection, and Ricks then told the witness that he would take no bond, and would not admit (428) the plaintiff to the bounds. The witness, in consequence of these declarations, proceeded no further, and no tender or offer of any other nature than that before made was proved.

It was contended below, for the plaintiff, that it was the duty of Ricks, as an officer, to prepare the bond, but even if this were not the law, there had been proved a sufficient of-

fer on the part of the plaintiff to do all that the law required, and a refusal by the officer.

For the defendant it was said, that it was incumbent on the plaintiff to shew that he had actually prepared a bond, had it executed, and tendered it at the time of the refusal.

The opinion of the Court upon the law, was, that it was not incumbent on the Sheriff to prepare a bond for the prison bounds, whenever a person should ask the benefit of the rules, although the prisoner might have been able to refer to a person, ( a sufficient security, ) or even have such a person present who would state his willingness to become security. But, although the Court thought it the duty of the prisoner, and not of the Sheriff, to have the bond prepared, yet, if in this case the jury should believe that the plaintiff, by Arrington acting for him, offered to give security for the bounds, and to have a bond written and executed, and had at the time the ability to give sufficient security, and that Ricks, the officer, then declared that he would not admit the plaintiff to the privilege of the bounds, and would not take any bond, this was, on the part of the officer, a waiver of any further act to be done by the plaintiff, and rendered it unnecessary for the plaintiff to have a bond written and executed, in order to maintain his action. The jury returned a verdict for the plaintiff, and a new trial having been refused, from the judgment rendered, defendant appealed.

( 429 ) *Mordecai*, for plaintiff, cited *Douglas* v. *Patrick*, (3 Term Rep. 683,) *Hotham* v. *East India Company*, ( 1 Term Rep. 638,) *Jones* v. *Barclay*, ( Doug. 684, ) ( Chitty 317. )

HALL, Judge.—Viewing this as a question between the plaintiff and the defendant as an individual, and not as Sheriff, I think the Law is on the side of the plaintiff; and I think it was correctly stated by the Judge to the jury, in his charge, when he stated, "That if they should believe from the evidence, that the plaintiff, then a prisoner, by Arrington acting for him and on his behalf, offered to give security for the bounds, and to have a bond written and executed, and had at the time the ability of giving sufficient security, and that Ricks, the officer, then declared that he would not admit the plaintiff to the privilege of the bounds, and would not take any bond, this was, on the part of the officer, a waiver of any further act to be done by the plaintiff, and

rendered it unnecessary for the plaintiff to have a bond written and executed, in order to maintain his action," and I think *Jones* v. *Barclay*, (Doug. 684,) an authority in point.

I think the first part of the Judge's charge more questionable: when he says it was the duty of the plaintiff to furnish a bond to be executed for the prison bounds. It is certainly correct when applied to dealings between private citizens; but custom and the fitness of things require, that public officers, who are paid for their services, should furnish blanks to be executed by individuals who have business to transact with them in that character, Much and serious injury and inconvenience would be the consequence of a different practice: few men are acquainted with the forms necessary to be observed in drawing bonds which it is their duty to execute. The general, and, I had thought, the universal practice was, that Clerks, Sheriffs, and others, furnished the necessary papers appertaining to their of-
(430) ficial duties. From this consideration, as well as from the ground first taken, as to the charge of the Judge, I think the rule for a new trial should be dicharged.

HENDERSON, Judge.—In transactions between individuals, it certainly is necessary that he who is bound by his contract, or even by law, to give a bond, make an assurance (such as he by his sole act can make,) an acquittance, or release, must make such bond, assurance, &c.; and it is not sufficient for him to shew that he was ready and willing to do so; and if he does not do it in stating his excuse, he must, in general, shew that the defendant either *prevented* the performance, or rendered it unnecessary to do the prior act by his *neglect*, or by his discharging the defendant from his performance: these are the words of Chitty, 317, 318, in his treatise on pleading, and which are extracted from the best authors, and are consonant to the rules of common sense. His ability to perform must also be shewn, otherwise the non-performance could not arise from the prevention, neglect, or discharge of the defendant, but from his inability to perform. What amounts to a discharge, is a matter of law; but the fact from which the legal inference is drawn, is matter of fact. To constitute the discharge, it is not necessary that the word discharge should be used; any other word, or act, which goes to shew that the plaintiff does not

require the act to be done, as that it is unnecessary, or unavailing, or that the plaintiff would not accept of it, if done, is the same thing, and has the same operation, and the meaning of it is, I will not accept of it; it will profit you nothing; it will not be the basis of any act of mine, nor will you, by my act, obtain what you are seeking therefrom; it is perfectly useless and unnecessary for you to do it. The Law, which requires nothing to be done in vain, dispenses with the performance of the act: it amounts, therefore, to a tender and refusal. Notwithstanding the construc-
(431) tion given to the case of *Jones* v. *Barclay*, (Doug. 684,) I consider it an authority for the plaintiff, except upon the point of an independent ability, of which, hereafter. The declaration states, that the plaintiff offered to assign the equity of redemption and a release, and tendered to the defendant a draft of the assignment and release for his approbation, and then and there offered to execute and deliver, and would have executed and delivered the said assignment and release to the defendant, but that the defendant *absolutely discharged* the plaintiff from executing the same. The defendant pleaded that the plaintiff never did *execute* an assignment of the said equity of redemption, &c. to which plea the plaintiff demurred. This demurrer of the plaintiff put, not only the validity of the defendant's plea, but the goodness of his own declaration, to the test; and if the facts set forth in it were not sufficient to support his legal inference, to-wit, that the defendant discharged him from the *execution* and delivery of the assignment and release, the declaration is bad; for a declaration is a compound of facts and legal inferences: it is the province of the jury to pass upon the facts, and of the Court upon the legal inferences. The decision of the Court upon the demurrer was, that the declaration was good, thereby affirming that there was no necessity of making and sealing the assignment and release; but that an offer was sufficient, if the defendant refused to take *any* assignment or release; that is, that the refusal to take any assignment or release, dispensed with the necessity of making one; for why should *one* be made which is to enable the Court to see that it is a good one, when *none* would do: But the counsel says, this was on a demurrer where the facts are admitted—what facts? Only those set forth; and the demurrer varies it from an issue in this only, that the Court at once judges upon the correctness of the

legal inference made by the declaration, the facts being admitted: on an issue, the facts are denied; but when (432) on an examination found to be true, the Court must see, when passing judgment, that the legal inferences are correct; and in the case in Douglas, the same question would have arisen, if the defendant's plea had been found by the jury to be true; for by the judgment given to the plaintiff, the Court thought it no answer to the plaintiff's declaration, for its truth was omitted by the plaintiff's demurrer. So far as regards this part of the case, the facts stated in the record amount to a discharge if true, provided it appears that the plaintiff shews that he had the ability to perform, which the counsel for the defendant contends, means the independent power to perform the act; and this is true where the act to be performed is one capable of being reduced under his absolute control, as in a tender of money, or a horse. It is not sufficient to shew that his friend was standing by, ready to lend the one or the other, if the defendant would agree to receive it: the things are in their nature capable of being placed entirely within the control of the person making the offer, and his being in that state, with regard to them, shews his inability to go farther, for the things are capable of being more within his control; but when he is to bind himself, with security, as a free agent is to be bound with him, and he has that security present, and willing to become bound, a moral certainty would seem to be sufficient; and if he is prevented by the discharge of the defendant, I think it would seem to follow, that the nonperformance arises from the discharge of the defendant, and not from the plaintiff's inability to perform the act. I repeat it again, a moral certainty of being able to perform is sufficient. It is said, this might encourage spurious offers; that men would agree to be security merely to entrap another: the defendant may avoid all harm by being merely passive, or by agreeing to receive the thing which he was bound to receive. There is no necessity of refusing, or discharging the plaintiff from the tender; and whether this was a delusive tender, was properly left to the jury; (433) and also, whether Arrington acted as the friend or or agent of the plaintiff, or merely as the enemy of the defendant, Vick. I am also induced to believe, that however the law may be between individuals, that whenever an officer is required to make his official conduct depend on

his taking or receiving a bond from a person, that it is his business to prepare one: custom and convenience require this: he is presumed to know the laws and the forms peculiar to his office, better than a mere individual: a contrary practice would lead to oppression; and although in this case no fee is fixed, from which it may be inferred that it was not his duty, it is either, I think, a *casus omissus*, or it is included in his extra allowance: nor need we apprehend vexatious applications any more than in cases of bail, where it it cannot be controverted that he is bound to furnish the bail bond, for he has a fee for it; for it is on his taking bond, and not for furnishing the bond, that the fee is due; and the Sheriff might be equally vexed by the applicant's omiting to sign the bail bond, for no fee would then be due. To avoid these inconveniences and oppressions, I think, on sound principles, it is the officer's duty to furnish all official bonds, and that the Sheriff now alleges, with a very bad grace, as an excuse for not giving the bonds, that it was not his business to prepare the bond, when he at the time declared that he would not take *any bond*. We should be well satisfied that this after-thought of the Sheriff furnished a good defence; and if it was not an after-thought, he is guilty of a foul fraud in misleading the plaintiff.

PER CURIAM.—Let the rule for a new trial be discharged.

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(434) STATE *v.* BEN, the slave of J. B. HERRINGTON.

*From Craven.*

Notwithstanding the act of 1741, a slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by *pregnant circumstances.*

Indictment for burglary, tried before *Badger, Judge.* In this case, the fact of burglary was proved by the testimony of a white man, a witness above suspicion, but the only evidence to shew any agency therein on the part of the prisoner, was given by a *slave*, and that evidence was direct and positive. The counsel for the prisoner contended such evidence was insufficient to convict the prisoner, because not supported by "*pregnant circumstances.*" The Court instructed the jury, that whatever rules existed on the subject, were rules of reason and prudence, addressed to their sound discretion, but that there was no positive rule of law which

should prevent them, if they believed the testimony of the slave, from finding a verdict of guilty against the prisoner, although his testimony was not supported by other proof.

The jury found the prisoner guilty; a motion for a new trial was overruled, and sentence of death passed, from which the prisoner appealed.

TAYLOR, Chief Justice.—I have not been able to ascertain in what manner slaves, accused of capital offences, were tried before the year 1741: the collections of the laws which I have seen, are silent on that subject; but it may be conjectured that the County Courts entertained jurisdiction.*

(435) Among the very few events, connected with the early settlement of the State, which history has condescended to notice, that of an insurrection of the slaves, in 1738, has come down to us; and I infer from the period of its occurrence, that it suggested the rigorous and detailed system of police which was established in two or three years afterwards. Accustomed, as our ancestors were, to the usages of the common law, and its solemnity in capital crimes, they were probably impelled by a sense of common danger, and the duty of self-preservation, to vest this extraordinary jurisdiction in three justices and four freeholders, who might be hastily collected at the court-house, and proceed to the condemnation and execution of a slave, without indictment, jury, or notice to the owner. Had such a special jurisdiction, so wholly out of the course of the common law, been created without any specification of the sort of testimony it should require, it is to be apprehended, that very slight circumstances would have led to a conviction; more especially in cases of conspiracy and insurrection, trials for which, have

*Among the early records of the County Court of Craven, may be found, a history of the proceedings of "a special Court of Sessions, held at the court-house in Newbern Town, the 10th day of April, 1740, truely to enquire into an accusation brought by Nicholas Fox against Rachel, a negro woman belonging to Martin Franck." The prisoner in this case appears to have been charged with a capital felony, and the Court was composed of four justices of the peace and three freeholders. This may perhaps furnish some evidence of the mode of proceeding in the case of slaves charged with capital offences, prior to the act of 1741.—*Reporter.*

in our own day, produced monstrous injustice.* It was a salutary caution, to the triers, not to infer from the unusual mode of trial, that they should be satisfied with (436) weaker evidence than the common law prescribes; and, since every other form by which the law aims to secure an impartial trial was withdrawn from slaves, the Legislature prescribe, that rather more evidence shall be demanded for their conviction, than is in general necessary. Reasoning of this kind occasioned, as I think, the act of 1741 to declare, that the triers should "receive such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing." When the act of 1793 extended the trial by jury to slaves, I strongly incline to believe, that it was a virtual repeal of so much of the above section, as differs from the common law rule of evidence; and that conferring the right of trial by jury in open Court, does, *ipso facto*, draw after it, as an incident, the common law principles of evidence, and all the consequences of common law proceedings. I do not, however, rest my opinion solely on this ground. It is to be observed, that every time the Legislature have touched this subject since the revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial in capital cases. The act of 1816, giving the Superior Courts exclusive jurisdiction of capital crimes, committed by slaves, extends to those persons the full benefit of a common law trial, indictment, the benefit of counsel and clergy, and the right of challenge for cause; withholding only the peremptory challenge, which could scarcely have been of any use to them. The first section directs, "that the trial shall be conducted in the same manner, and under the same rules, regulations, and restrictions, as trials for freemen are now conducted." This, it seems to me, is full authority to the Superior Courts to look

*One of the first cases which probably occurred after the passage of the act of 1741, is also to be found on the records of Craven County Court. The Court met on the 27th of April, 1741, to enquire (in the language of the record,) "for our Soveraign Lord the King, concerning the murther of Robert Pitts." The *enquiry*, for *trial* it was not, terminated in the conviction and almost immediate execution of Jack, a slave of the deceased; and from the evidence, as given in detail on the record, one cannot but be forced to the conclusion, that the excitement must have been wonderful, which could have induced men to doom to death a fellow being on such testimony as, if laid before a grand jury of the present day, would not induce it to find a bill.—*Reporter.*

at the common law for the rules of evidence, modified as they are in relation to coloured persons, by the act of 1777; and I cannot doubt that the first section, taken together with the repealing clause, does annul the 48th section of
(437) 1741. But why should the act of 1816, which does the Legislature so much honor, be so construed as to place slaves on a better footing, in respect to evidence, than free persons? On the trial of the latter for a capital crime, sworn to only by one witness, the jury is instructed to judge of the credibility of the witness, and, if they believe him, that one is sufficient to convict, without any pregnant circumstances. Whereas, if the rule of 1741 is still in force, the jury must be told, that however well satisfied they are with the testimony of one witness, or thoroughly convinced of the guilt of the slave, they must nevertheless acquit him in the absence of pregnant circumstances; and this, notwithstanding the previous finding of the bill by a grand jury, and the examination of the case in a way the most favorable to the discovery of truth. If the grand jury cannot find the bill upon the testimony of one credible witness, without pregnant circumstances, nor the petit jury convict, then the trial is not conducted "in the same manner, and under the same rules, regulations, and restrictions, as trials of freemen are now conducted." If criminal slaves cannot be punished for crimes which are usually committed with the most studied secrecy, but through a species of evidence not always to be had, and which, if obtained, could not deepen the conviction arising from the testimony of a credible witness; it is to be apprehended that a mischievous state of impunity will be the consequence.

There is no one circumstance tending to shew, that the Legislature of 1802 did not believe the provision of 1741 was in force, for in the act "to prevent conspiracies and insurrections among the slaves," the rule of evidence is re-enacted in relation to these crimes. Now the act of 1741 made it applicable, not only to those offences, but to all others, and if it were not repealed by 1793, must have been in force in 1802. The act last noticed was passed soon after some disturbances had arisen among the slaves in the lower part of the State, and the clause was probably re-enacted for
(438) the purpose of tempering that excess which public excitement had produced in the trials for these offences. Upon the whole, I think the conviction is right.

HENDERSON, Judge.—The act of 1741 erects a Court for the trial of slaves, composed of three or more justices of the peace and four freeholders, and empowers and requires them to take for evidence, the confessions of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulatoes, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a Jury. As long as this Court remained, under any modification, the testimony prescribed by the act remained with it. But when the trial of slaves was transferred, first to the County Court, by the act of 1793, and then to the Superior Court, by the act of 1816, Courts proceeding by known and established rules of evidence, the evidence prescribed to the Court established by the act of 1741, was not transferred with the jurisdiction, but the rules established in the Court to which cognizance of the offence was transferred or given, became the rule of decision, and it is not at all like the case of treason or perjury to which it was attempted to liken it, for in them the rules of evidence are attached to the offence, and will follow its trial to any Court; but the rule prescribed to the Court established by the act of 1741, is attached to the Court, and is confined to trials in that Court, or to a Court modified from that. I lay no stress on the words in the act of 1816, "rules, regulations, and restrictions," it is most probable they relate only to the form of the trial; nor shall I search for reasons which might have induced the Legislature to require *pregnant circumstances* in one Court, and not in the other; or why, by the act of 1802, to punish slaves for *conspiring* to rebel or make insurrection, or to commit murder, again prescribes the same rules as to the evidence, and particularly that the testimony
(439) of one negro, or person of colour, shall not be deemed conclusive or sufficient to convict, without *pregnant circumstances*, thereby strongly implying, that it was considered that the rule of evidence prescribed to the Court, established by the act of 1741, was no longer in force; but I know in practice the same thing is often, for greater caution, re-enacted. I think this case is clear, upon the grounds, that the rule as to pregnant circumstances was prescribed to another Court than the one before which this slave was tried; that the latter Court was in existence before the transfer of cognizance; that at the time of the transfer it had rules of its own, including the rules of evidence by which it ascer-

tained the disputed facts; that by the act of 1777, negroes, Indians, and mulattoes are declared to be competent witnesses against each other, without calling in the aid of Legislative intention arising from other acts. I can see no error in the Judge's charge, and no grounds for a new trial. Let the rule be discharged.

HALL, Judge, *dissentiente.*—It is proper, in this case, to take a view of all the acts of Assembly which relate to it. The act passed in the year 1741, ch. 24, sec. 48, is the first. It declares, that "if three or more negroes or other slaves, shall at any time hereafter consult, advise, or conspire, to rebel or make insurrection, or shall plot or conspire the murther of any person whatsoever, such consulting, &c., shall be adjudged and deemed felony, and the slaves convicted thereof shall suffer death." It then declares, "that three justices and four freeholders, owners of slaves, are empowered upon oath to try all manner of crimes and offences that shall be committed by any slave, at the court-house, and to take for evidence, the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with *pregnant circumstances*, as to them shall be convincing, without the solemnity of a Jury." Under this act, the uncorroborated testimony of a slave would not be sufficient to convict a slave of any crime. I do not think that the act of 1777, ch. 2, sec. 42, has any bearing upon the present question. That act only incapacitates negroes, mulattoes, and some other persons, to be witnesses, except against each other. This act only recognizes their competency, as the act of '41 had done, but it is silent as to their credibility. By the act of 1793, ch. 5, jurisdiction of all offences committed by slaves, is transferred to the County Courts, and to a Jury of good and lawful men, owners of slaves. Nothing is said in this act relative either to their competency or credibility. If the act of 1741, required pregnant circumstances to support the testimony of a slave or negro, until it is repealed, it is still required. I cannot think that the transfer of jurisdiction from the three justices and four freeholders, owners of slaves, to the County Courts, is, *ipso facto*, a repeal of it. The act of 1802, ch. 17, makes some new regulations as to the offences of conspiracy and insurrection, and declares, that as to them, the testimony of a negro or person of colour shall not be deemed

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sufficient or conclusive to convict the person charged, unless the same shall be supported by such pregnant circumstances as to the Jury shall appear convincing. It may be asked, why did the Legislature interpose this guard against convictions for conspiracy, &c., when the same guard was interposed by the act of 1741, against conviction of crimes of every description? The question I cannot answer, but I feel myself at liberty to say, that re-enacting in 1802 what was enacted in 1741, is no repeal of the first act. The next law on this subject was passed in the year 1816, (New Revisal, ch. 912.) This act transfers to the Superior Courts exclusive jurisdiction in all cases where slaves shall be charged with the commission of any offence, the punishment whereof may extend to life, limb or member, and under the same rules, regulations, and restrictions, as in trial of freemen for like offences. The latter expression, I think, relates to the
(441) mode of conducting the trial. It is altogether silent, both as to the competency and credibility of witnesses: that, as I apprehend, was left to the law as it then stood, I mean the law of 1741. This case has been likened to the cases of high treason and perjury, (and I think not improperly.) In each of those cases, two witnesses were necessary to a conviction, and I think it would be required, (until altered,) upon a transfer of jurisdiction of those offences from one tribunal to another. The only way of resemblance between those cases and the one before us, is, that in those cases, and those only, the testimony of one witness is not sufficient to a conviction in the case of freemen; and the testimony of one witness, I mean that of a slave, without pregnant circumstances, is not sufficient to convict slaves of any crime. It has been argued, that when the Superior Courts acquired jurisdiction in these cases, the rules of evidence attached to them, as in trials of free persons. I cannot come to the conclusion, that a positive law should be repealed by subsequent laws, in which so little intimation is given of Legislative will that they should have that effect. That the policy of the law of 1741 was founded on a sense of the degraded state in which those unhappy beings existed, no doubt, will be ceded. Being slaves, they had no will of their own, and a humane policy forbade that the life of a human being (one of themselves) should be taken away upon testimony coming from them, unless some circumstance appeared in aid of that testimony. If this was a just policy, I am not aware, if we were

now to examine their condition, that any thing would be discovered so much more favorable to the cause of truth, as to require a repeal of the laws now in force, by the Legislature, or a construction of them, by the Courts, tending to the same end.

My opinion therefore is, that the rule for a new trial should be made absolute.

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(442) STATE *v.* POLL and LAVINIA, slaves, etc.

*From Chowan.*

The declarations of a deceased person, that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, and felt assured his disease would prove fatal, are admissible as dying declarations.

When a common design is proven, the *act* of one, in furtherance of that design, is evidence against his associates; but the *declarations* of one of the parties can be received only against himself.

It is not competent for owners of slaves, or their counsel, to *consent* to the removal of a criminal cause against such slave; it cannot be otherwise removed than on *affidavit*.

This was an indictment against the prisoners and one John Skinner, for the murder of Samuel Skinner, by poisoning. The bill was originally found by a grand jury, of the county of Washington, and after arraignment and plea of not guilty, recorded severally for each, the Solicitor for the State, and the prisoner, John Skinner, consented to remove his case to the county of Chowan for trial; and the owner and counsel of the other two prisoners consented, with the State's officer, to a similar removal of the cases of Poll and Lavinia.

The indictment against Poll and Lavinia came on to be tried in Chowan Superior Court, before *Daniel*, Judge, and the following outline presents such facts as are necessary for a correct understanding of the points raised. The poison alleged to have been given, was white arsenic; and the object of the State was, to shew that John Skinner purchased the poison under false pretences, and gave it to the prisoners (who were domestics in the family of Samuel Skinner), and that they mixed it with the food and drink of Samuel. The State, to prove a conversation between the prisoners, introduced a witness who accidentally overheard it; and he stated that they spoke of having put something into Samuel Skinner's soup, which would kill him and all others who par-

took of it. Lavinia then advised Poll to carry some of
(443) that which they had put into the soup, into the house; and if, during the night, Samuel Skinner called for water, to put some in the water, adding, "that is the way *he* said do it"; and Poll accordingly took down from a shelf something wrapped in paper, and putting another wrapper of paper over the first, placed it in her bosom. On examination before the committing magistrate, Lavinia said, that the *he*, referred to in the conversation stated, was John Skinner, who had given to Poll something like *lime*, but it was heavier.

The Solicitor for the State then offered to prove, by a declaration of John Skinner, that he had purchased a quantity of arsenic just before, under the pretence, as the State alleged, of curing the horse of one Mariner, of a poll evil. This declaration was objected to, but the Court received it; and Mariner then proved that he never requested John Skinner to purchase arsenic to cure his horse, and in fact never had a horse diseased with a poll evil.

Samuel Skinner died on Thursday, and his declarations from the Sunday previous, up to his death, were offered in evidence: these were objected, as not being dying declarations, but the Court received them. He stated his belief that he should die, though he was occasionally better: he said he was poisoned, and as he believed, by Poll, who had given him something in his food and drink.

The jury found the prisoners guilty, and a new trial was moved for—1st, because Samuel Skinner's declarations were improperly received; and 2dly, because the declarations of John Skinner, that he had purchased arsenic, were not evidence against the prisoner. A new trial was refused, and it was then moved, in arrest of judgment, that the Superior Court of Chowan had not jurisdiction in the cause. The motion was overruled, and sentence of death pronounced, from which the prisoners appealed.

TAYLOR, Chief-Justice.—The declarations of the
(444) deceased, made at a time when he despaired of his recovery, and felt assured that though he was something better after the physician attended him, his disease would prove ultimately fatal, appear to me to have been properly admitted. The latest and most authoritative cases shew that the Court is to decide, and not the Jury, whether

the deceased made the declaration under the apprehension of death. 1 East's Pl. Cr. 357, John's case. But as to the declarations of John Skinner, I know of no principle upon which they could be received as evidence against the prisoners. Even if he were a party to the record, they could be evidence only against himself, and not against the other Defendants. For this reason there ought to be a new trial. Whether the Superior Court of Chowan had jurisdiction of this case, depends upon the construction of the act of 1816, c. 912. The words of the second section are, "that such cases may be removed for trial to an adjoining county upon affidavit of the owner, or, in his absence, of the counsel of such slave or slaves, in the same manner as causes may now be removed by freemen." By the preceding act of 1813, c. 853, suits may be removed by consent; but there is nothing in the phraseology to warrant a belief that criminal prosecutions were intended to be included. On the contrary, where the Legislature provide for their removal, they use different language, as in the act of 1808, c. 745, in which the words are, "that no cause, civil or criminal;" and it then proceeds to require an affidavit for their removal. The same expressions, "all causes, civil and criminal," are used in the act of 1806, c. 693. From all which, the conclusion is, that as criminal causes could not, in 1816, be removed otherwise than by affidavit, it was not competent for the owner of the slaves and their counsel, to consent to the removal of this.

I am, therefore, of opinion that a new trial should take
(445) place in Washington Superior Court, unless the case be properly removed by affidavit.

HENDERSON, Judge.—By the act of 1813, N. R. 1274, the *parties* in a suit may remove it by consent; and should the word *suit* embrace criminal prosecutions for capital offences, a removal by consent of the owner, or counsel of a slave, or the consent of both, is neither within the words or spirit of the act, for they are not parties. But it is inferred, that as a cause may be removed upon the affidavit of the owner or counsel, it may be removed by their consent. I think such inference is incorrect. The object of the law is to obtain an impartial trial, and when it is made to appear to the Court, that in all probability such object is unlikely to be obtained in the Court where the cause is pending, the Court is directed to remove it; and it is a matter of not much moment from

what source the information comes: it is the act of the Court upon such information. The Court perceives, if the fact be true, that the purposes of justice will be forwarded by a removal; and therefore, in conformity to the purposes before mentioned, the Legislature gave to the owner or counsel, the power of shewing on oath the facts upon which the Court acts. But whether the purposes aforesaid will be answered, when the owner or counsel consents to the removal, do not appear. What are the reasons for such assent, need not be stated: there may be none, and therefore it would be better, perhaps, for the slave to be tried in the county where the offence is alleged to have been committed. The character, both of the accused and witnesses, would be better known; or the motive may be to obtain an unfair trial; and it is no answer to say, that the counsel or owner might obtain the same thing upon their affidavits; it is true they may, but in so doing they must commit a perjury, and every power or privilege may be abused. I therefore think, that the cause was never properly in Chowan Court, and that the (446) trial there was a perfect nullity. Judgment of death pronounced by that Court, must therefore be reversed: the Court of Washington will proceed to the trial, as if no such proceedings had ever been, as have taken place in Chowan. This view of the case renders it not absolutely necessary to express an opinion on that part of the case which respects the declarations of John Skinner, being given in evidence to the jury. But perhaps it will prevent another appeal to this Court, shortly to state the reasons why we think they ought not to have been received, as, possibly, our silence on the subject may be construed into an approbation. The rule has never been carried farther than this, that when a common design is proven, the act of one, in furtherance of that design, is evidence against his associates: it is in some measure the act of all; but the *declarations* of one of the parties can be perceived only against himself. As to the dying declarations of the deceased, I concur in the opinion of the Chief Justice.

HALL, Judge, concurred.

STATE *v.* M'CARSON.

*From Buncombe.*

The defendant was indicted for having erected a gate across a public road. The defence rested on several acts of Assembly, the view of which, as taken in the opinion of the Chief Justice, renders a detailed statement of them unnecessary.

TAYLOR, Chief Justice, delivered the opinion of the Court:

The special verdict is framed with a view to obtain the judgment of the Court upon the question, whether (447) the defendant committed a nuisance by erecting, on the 2d July, 1821, a toll-gate across a public road leading from Asheville to the South Carolina line? The solution of this question depends upon the construction of five several acts of Assembly, passed at as many sessions from the year 1809, to that of 1814, inclusive. The merits of the case cannot be understood without an examination of those acts, but I think a very brief one will suffice. The first section of the first act authorizes three persons, viz.: Murray, Greer and Kyrkindall, to open and repair the road from Buncombe court-house, over the Saluda gap, to the South Carolina line, and to keep it in repair under the direction of certain commissioners. The second section appoints those commissioners, seven in number, and invests them with power to lay off and superintend the road, and to direct the manner in which the same shall be repaired. It further provides, that when the road shall have been completed to the satisfaction of the commissioners, or a majority of them, then, that Murray, Greer and Kyrkindall may erect and keep one or more turnpikes on the same, or such places as the commissioners may agree upon, for a term not exceeding ten years. The third section authorizes the County Court of Buncombe, at the next Court after the road is completed, and so certified by the commissioners, to establish the rates of toll to be received during the time of the grant. It also gives to the county and Superior Courts of that county, the same jurisdiction over the keepers of the turnpike road, as they possess over overseers. The fourth section imposes upon the commissioners the duty of making a return to each County Court of the state of the road; and the fifth section protects the gates, the toll, and the road. Under this act,

the commissioners reported in the manner stated in the special verdict, and it is not doubted that the grantees obtained a title to the turnpike for ten years, the time specified. The act of 1811 was passed for the purpose of
(448) changing the commissioners, which it did, giving to the new ones the same powers which were possessed by the former ones. The act of 1812 authorizes the grantees to extend the turnpike road from the north end of Big Mud Creek Bridge, to Samuel Murray's, senior, old place. The second section changes the commissioners appointed in 1811; and, when the turnpike is extended, authorises the new ones to determine the additional length of time which the proprietors shall retain the same, and the profits arising therefrom, in consequence of such extension, and to report the same to the next General Assembly. The commissioners performed this duty, and made a report accordingly; in which they recommend an additional twenty years, to be added to the ten first allowed. This report was made to the General Assembly at the sessions of 1813. It is under this act of 1812 that the question arises; it being contended for the defendant, that everything was done by the proprietors necessary to entitle them to the extended time; and that there is no ground on which to infer that the Legislature meant to deprive them of it. To this, the answer appears to be, that the Legislature, had they been so disposed, might have made the determination of the commissioners final, effectual to vest an additional right in the proprietors. They had so done in the act of 1809; but the commissioners appointed under 1812, are directed to ascertain the profits arising from the road, in the consequence of the extension; and, though they are directed to determine the additional length of time, yet it is evident that such determination was not intended to be final, since they are to report both that and the profits, to the next General Assembly. It was a preparatory measure, directed by the act for the purpose of enabling the Assembly to decide, upon a full view of the whole ground, whether any, and what, extension of the charter should be made. If the commissioners were to have acted finally on the subject, their report to the Assembly would have been per-
(449) fectly useless. It was for the proprietors to determine whether they would extend the road, according to the first section of the act, and trust to the hope of the charter being enlarged. The public faith is in no degree pledged,

that it shall be: and in this sense it must have been understood by the commissioners; for they *recommended* an extension of the term, urging reasons from the expensiveness of the work on the new road, and its advantages to the public, wherefore it would be just. But it did not appear in the same light to the General Assembly, for, at the very same sessions that the report was returned, they annul the powers of the old commissioners, and appoint new ones, with different powers; which, however, were not exercised, in consequence of the commissioners refusing to act. In the subsequent law of 1814, there is nothing whence an argument can be drawn, in favour of an extended term; and the case settles down to this, that as the report of 1813 was *not* confirmed, the proprietors have obtained nothing beyond their original charter, which having expired at the time when the offence is charged to have been committed, the defendant is, in point of law, guilty, in the manner laid in the indictment.

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## STATE *v.* McDOWELL AND GRAY.

*From Buncombe.*

To support an *indictment* for taking away property, it must be a violent taking from the *actual* possession of the owner at the time.

Indictment for breaking into the possession of one Sarah Somers, and taking away her slave. The fact was, that the slave was not in the actual possession of Sarah at the time of the taking, but was in the field of another person, to which she had been sent with James Somers, a brother of (450) Sarah. McDowell, after some conversation with James and the slave, (who were children,) seized the slave, and placed her on the horse of Gray, and Gray carried her off. James offered such resistance as he could to the taking. The Court instructed the Jury, that Sarah Somers was, under the circumstances disclosed, in possession of the slave; that the resistance of James, her brother, was her resistance; and that the taking was with force and a strong hand. The Defendants were found guilty. A new trial was refused them, and from the sentence pronounced they appealed.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The indictment charges, that the Defendant broke in and

upon the possession of Sarah Somers, and took away her slave. The truth of the case was, that the slave, under the immediate control, and in the possession of James Somers, was five hundred yards distant from Sarah, and in another's field. Though for all civil purposes, and to protect the right of Sarah, this possession of James' would be considered as hers, yet the principle, on which such construction would be made, does not apply to indictment, in which there is "no latitude of intention, to include any thing more than is charged; the charge must be explicit enough to support itself." 2 Burr., 1127.

To sustain this charge, by such proof as was given of the possession, would be to convert an action of trespass into an indictment. If the latter will lie for taking away the slave, it must be for a violent taking from the actual possession of the person at the time. The injury done to Sarah, in this case, consisted in the loss of her property, which may be redressed by a civil action. But the injury done to the public, if any, consisted in the violence and outrage with which James Somers's possession was invaded. A new trial is consequently awarded.

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(451) STATE *v.* WYNNE.

*From Tyrrell.*

An individual who acts as an ordinary keeper, without taking out license and giving bond, but who has a license to retail spirituous liquors, may be indicted on the act of 1798, ch. 501, for exacting more than the rates established by the Court of his county, and he is estopped from denying the fact of his being a tavern-keeper.

This was an indictment against the Defendant, as an ordinary-keeper, for exacting more than the rates fixed by the County Court. The Jury returned a special verdict as follows: that the Defendant did open and keep a certain public house, in which he entertained all persons, after the manner of an ordinary and tavern-keeper, during the time and at the place mentioned in the bill of indictment; that he obtained and had, during the said time, a license from the Court of Pleas and Quarter Sessions, to retail at his own house spirituous liquors, and did retail the same; but that he had not any license, nor did he enter into any bond, as required by act of Assembly, to keep an ordinary. They further find, that the rates of fare mentioned in the indict-

ment, were establishad by the County Court, as the indictment charges; and that the Defendant, knowing the rates aforesaid, did demand and receive the several sums as charged in the bill of indictment. But the Jury are ignorant whether the Defendant can by Law be considered an ordinary-keeper, without such license; they therefore pray the advice of the Court: and if the Court shall be of opinion, that the Defendant cannot in Law be an ordinary-keeper, without such license and bond as is required by act of Assembly, then they find the Defendant not guilty; if the Court shall be of a contrary opinion, then they find the Defendant guilty. On this finding, the Court gave judgment for the State, and passed sentence, whereupon Defendant appealed.

(452) *Manly* for Defendant.—1. The Defendant is not an ordinary-keeper in Law, and therefore not chargeable at all.

2. If he be an ordinary-keeper in Law, he is not, under the acts of Assembly, liable to be *indicted* for the offence charged.

3. If he be indictable, the present charge or bill is defective, and no judgment can be passed against him.

1. He is not the keeper of an ordinary or public tavern, without having first obtained a *license* from the County Court of Tyrrell for the purpose, and *given bond* and security to keep the same faithfully and properly, agreeably to the act of Assembly of 1798, ch. 18. Iredell's Revisal. This is the description of persons about whom the Assembly was legislating, and for whom the justices of the respective County Courts in this State are authorized and required to establish rates of fare. These are the only public houses recognized by the Law. Defendant is expressly acquitted of this character by the verdict of the Jury, who find, "that he had not any license, nor did he enter into bond, as required by act of Assembly, to keep an ordinary."

Nor does the finding of the Jury, that he "obtained and had a license from the Court of Pleas and Quarter Sessions, to retail at his own house spirituous liquors, and that he did retail the same," make him an ordinary-keeper.

The act of 1798, amendatory of the act of 1779, ch. 10, and the act of 1816, ch. 906, New Revisal, and all other acts passed upon the subject, make an evident distinction be-

tween retailers of spirituous liquors and ordinary-keepers. The very licenses themselves specify different objects, and import to be granted for different purposes. The law requires the ordinary to give bond for the proper discharge of his business, but requires none of the retailer of spirituous liquors. The same distinction is observed in the common understanding of the country, and in the universal acceptation of the terms.

But the jury found, "that the defendant did open (453) and keep a certain public house, in which he entertained all persons, *after the manner* of an ordinary and tavern-keeper. His was therefore a house of *private entertainment*,—a term well known in the country, as used to designate a house that is opened and kept upon his own responsibility, and having no other or higher claims or pretensions to the patronage of the public, and affording no other safeguard to the comfort and convenience of his guests, than such as might be derived from his own character and circumstances. A house in which he might entertain only such persons *as he chose*, and give them such fare and at such prices as they could agree. A house that he could discontinue at pleasue, and at any time he pleased, which he could not do, provided he was an ordinary-keeper under the law; for the condition of the bond required by the act of 1798, is, that he must keep it open and *constantly* provided with diet, provender, etc., *for one year*. Therefore, the defendant is not an ordinary-keeper in law, and so is not chargeable at all. But

2. If he be an ordinary-keeper in law, he is not, under the acts of Assembly, liable to be indicted for the offence charged. The act of 1779, ch. 10, sec. 9, Iredell's Revisal, prescribes and enacts the penalty of the offence charged in the bill of indictment, to be "a forfeiture of fifty pounds, to be recovered by the informer to his own use, before any jurisdiction having cognizance thereof." The act of 1798, ch. 18, sec. 2, Iredell, and under which defendant is indicted, for that is the last act upon the subject, is merely amendatory and *cumulative* of the act of '79. 2 Hale's P. C., 705.

No penalty being enacted in the act of 1798, the penalty previously established by the law of 1779 is thereby recognized, and remains the same. Defendant may therefore *be sued* by the informer for the forfeiture of fifty pounds, but is not *indictable* for the offence charged. But an offender is

sometimes indictable upon the *prohibitory clause* of a
(454) statute, *in addition* to his *liability* to a *penalty* under *snch statute.* This leads to the third argument proposed, viz.:

3. If he be indictable, the present charge or bill is defective, and no judgment can be passed against him. The indictment concludes, *contra formam statuti.* The power of fixing rates of fare to be taken by ordinaries, is vested in the County Courts by act of 1798, sec. 2 of ch. 18, that being the last act; and the prohibitory clause against an ordinary's receiving more than the settled rates (if there be any such clause at all), must be contained in the act of 1779. But where an act relates to another, as where one makes an offence and the other a penalty, the indictment should conclude, *contra formam statutorum*—2 Hale, 173.

This charge is therefore materially defective, and the State is not entitled to judgment against the defendant.

TAYLOR, Chief-Justice.—I am of opinion, that judgment for the State was properly entered up on this special verdict. The indictment is framed on the act of 1898, c. 501, the second section of which, authorizes the County Courts to grant licenses to keep ordinaries; and at their discretion, to withhold them from immoral persons, and those who are too poor to imply with the intent of the act. Persons obtaining licenses, are required to give bond, conditioned for providing good and wholesome diet and lodging for travellers, etc. By the fifth section, the justices are directed to rate, each year, the prices of liquor, diet, lodging, etc., *to be taken* by ordinary keepers; and the same section makes it the duty of the ordinary-keeper to set up those rates in the public room, under the penalty of twenty pounds. The defendant violated the law, in selling for higher rates than those settled by the Court; but it is objected, that not having taken out a license, he is not an ordinary keeper, and therefore not indictable: but I think it would be against all prin-
ciple and authority, to allow this defence to be avail-
(455) able. The defendant has held himself out to the world as an ordinary-keeper: he has enjoyed more than the emoluments of one duly authorized, and has consequently assumed all the responsibilities of the character. To what end is the law made, if any man may set up a tavern without a license, and sell at rates established by

himself? He may be without character, and without credit, and contribute with impunity, to that depravation of the public morals, against which the law aims to provide. He may also impose upon the public under the color of legal authority, and when called upon to answer for his conduct, shelter himself under his own double wrong of disobeying the law, and defrauding the revenue. I conceive that the defendant has precluded himself in the way of estoppel, from denying the fact of his being an ordinary-keeper; upon the same principle that, in an action against a clergyman for non-residence, the act of the defendant as parson, and his receipts of the emoluments of the church, should be evidence against him that he is parson, without requiring the plaintiff to prove the defendant's title, according to the case of *Berryman* v. *Wise*, 4 Term. Rep., 306; and the numerous cases in the books tending to prove, that in the case of all peace officers, justices of the peace, constables, etc., it is sufficient to prove that they acted in those characters, without producing their appointments. 3 Johns., 431; 6 Binney, 88; 9 Mass. R., 231; Leach. Cro. C., 585. It appears not less certain to me, that the defendant is indictable under the act, for selling at higher rates than those established by the Court. The rule, well established on this subject is, that where a statute creates a new offence, by making unlawful what was lawful before, and appoints a particular remedy, that method, and that only, must be pursued. *Cartle's case*, Cro. Jac., 643. But when the offence was punishable at common law, and the statute prescribes a particular remedy, there the prosecutor may proceed, either at common law, or according to the statute, because the sanction is cumulative. Accordingly, it has been held, that keeping an ale-house without license, was not indictable, because it was no offence at common law, and the statute which makes it an offence, has made it punishable by committing the party for three days. *Stephens* v. *Watson*, 1 Salk., 45. That case affirms the principle, that if the statute had not directed a particular mode of proceeding, an indictment would have lain; for where a new created offence is prohibited by the general prohibitory clause of a statute, an indictment will lie. 1 Bur., 544. Though the act of 1798, c. 501, imposes some penalties for the neglect of other duties, it imposes none for keeping an ordinary without a license, or for selling at illegal rates; and it appears evidently that such omission was the effect of

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design, when we look at the two former acts on the same subject, 1741, in Swan's Revisal, and the act of October, 1799, in both of which, a penalty is imposed for selling provisions at higher rates than those settled by the Court. The first act imposes a penalty of ten shillings, and the last a penalty of fifty pounds. A comparison of the acts will shew, that the one of 1779 was before the Legislature of 1798; and I think the conclusion follows that they omitted the penalty, in order that the proceeding by indictment should be alone pursued. In the language of Lord Mansfield, "It is to be presumed that the Legislature *then knew and considered*, that disobedience to an order of sessions, was an offence indictable at common law." 2 Burr., 804.

HALL and HENDERSON, Judges, concurred.

(457) STATE *v.* RUTHERFORD.

*From Rutherford.*

A well grounded belief that a known felony is about to be committed, will extenuate a homicide committed in *prevention* of the felony, but not a homicide committed in pursuit, by an individual, of his own accord.

This was an indictment for an assault on one Spurlin, with an intent to kill him. The case, as proved before Norwood, Judge, was, that the defendant and one Magness, in whose employment Spurlin was, lived near each other; that during a temporary absence of Magness from his home, one of his slaves had been much injured by the bite of a very fierce dog, owned by Rutherford; on the return of Magness, hearing what had happened, he requested Spurlin to take a gun, go to Rutherford's house, and tell him that if he would permit his dog to be killed, he (Magness,) would be satisfied, otherwise, he would seek redress by law; and also instructed Spurlin, if Rutherford consented, to kill the dog. At dark, Spurlin accordingly went, and took the gun for the double purpose of defending himself from the dog, and of killing him, should Rutherford assent. On arriving within eighty yards of the house, he coughed, and the dog immediately attacked him; after trying in vain to keep the dog off with the gun, he fired, and injured the animal slightly: Rutherford thereupon, immediately came out of his house with his

gun, encouraged his dog, and ordered his negroes to pursue the person who had fired the gun: Spurlin hearing this, ran towards the house of Magness, which was at some small distance, and was pursued by Rutherford, who, when within forty paces of him, without speaking, fired, and wounded Spurlin in the head. On discovering who it was, Rutherford expressed his regret that the whole load had not passed (458) through Spurlin. The Court, after instructing the jury generally, as to the law, was requested by defendant's counsel, particularly to charge them, that if they believed the defendant, Rutherford, had a well grounded belief that the person who fired the gun intended to commit a felony, it would extenuate the offence, and the defendant would be entitled to a verdict. The Court declined doing so, and instructed the jury that there must be a felony committed, or strong and convincing evidence that a felony had been committed, or the party slaying, summoned by a proper officer, to extenuate a killing in pursuit; and that even then, if it should be apparent there was no necessity to kill, the offence would not be extenuated, but would be murder; and that an intention to commit a felony, abandoned by the party, would not warant a violent arrest. The jury found the defendant guilty: a new trial was refused: and from the judgment and sentence of the Court, defendant appealed.

HENDERSON, Judge.—The defendant's counsel prayed the Court to instruct the jury, that if they believed that the defendant, Rutherford, had a well grounded belief that the person who fired the gun *intended* to commit a felony, it would extenuate the offence, and the defendant be entitled to a verdict. The Court declined to do so, and instructed the jury that there must be a felony *committed*, or strong and convincing evidence that a felony had been committed, or the party slaying, summoned by a proper officer, to extenuate a killing in pursuit. The Judge, if he erred at all, erred in favor of the defendant, and against the State. A well grounded belief that a known felony is about to be committed, will extenuate a homicide committed in prevention of the act, but not a homicide committed in pursuit, by an individual, of his own accord. To extenuate a homicide committed in pursuit, there must be an actual felony committed; and it is said, that no evidence, however convincing, (459) even the finding of the grand inquest on oath, will

supply the want of an actual felony's being committed, where an individual, of his own accord, commits a homicide in pursuit; because the pursuit by the individual is an officious act, it not being his duty to arrest, unless called on by an officer; and from the tenderness of the law towards the life of a citizen, with which, I presume, is intermixed some portion of policy, for it might be a means of gratifying private revenge, it is to be observed, that some doubts are expressed by Mr. East, where the grand inquest has found that a felony has been committed; but no case is brought forward to support that doubt, and he concludes, that at least, it will be *prima facie* evidence that a felony was committed. But as I said before, a well grounded belief that a known felony was about to be committed, will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when that necessity ceases, and the supposed felon flies, and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be that he had intended to commit a felony, will not extenuate the offence of the pursuer. This extenuation rests upon an actual felony committed, and a *necessity* for the killing to prevent the escape of the felon; the request of the counsel, and the charge of the Judge in answer thereto, have more the appearance of the discussion of an abstract proposition, than the subject matter then under consideration; for I am at a loss to perceive, how, in this case, an idea could be entertained by Rutherford, that the person who fired the gun was about to commit a felony. A savage and fierce dog, at an early hour in the night, before bed-time, attacks a person in his owner's yard, a gun is fired at him, but misses him, the dog continues the attack, no attempt is made to take the dog off, the person who fired retreats towards a near neighbour's house, is pursued by Rutherford and fired
(460) upon, and struck with shot in a vital part; how it could be supposed that Rutherford entertained a well grounded belief that the person intended to commit a felony, under these circumstances, I am at a loss to say; and the Judge might have expressed an answer to the counsel's request either way, without affecting the merits of the cause; the verdict of the jury might have been the same.

On the doctrine of reasonable ground to believe a felony was about to be committed, see East's Cr. L. 273–4; Cro. Car. 538; *Sevil's case*, 1 Hale 42, 474; *Browne's case*, 1776, Leach

151. That there must be a felony actually committed, East 300, and the authorities there cited.

I think, therefore, that the defendant has no reason to complain, and that the rule for a new trial be discharged.

TAYLOR, Chief-Justice, and HALL, Judge, concurred.

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## STATE *v.* HANEY.

*From Rutherford.*

All that is necessary, as regards laying the time in a bill of indictment, is, that the offence shall appear to have been committed before the finding of the bill, except in those cases where the time forms part of the offence.

In general, the time is not traversable, and if it be laid after a *scilicet*, and be repugnant to the time laid in a former part of the indictment, the *scilicet* will be rejected as superfluous.

This was an indictment for a libel, on which the defendant had been convicted before *Norwood, Judge.*

The indictment was as follows, viz.:

"The jurors for the State upon their oath present, that Timothy Haney, of the county of Rutherford, on the 22d day of April, 1819, maliciously and falsely intending to defame one Richard Good, an (461) honest and good citizen of this State, and to bring him into hatred and contempt among the citizens of this State, on the day and year aforesaid, in the county aforesaid, a certain false, scandalous and libellous writing against the said Richard Good falsely and maliciouly did frame and make, and then and there did cause to be written and made, and also then and there did cause to be published in the form of an advertisement, the substance of which writing is as follows, to-wit, (here follows the libellous matter;) and that the said Timothy Haney, with an intention to scandalize the said Richard Good, and to bring him into contempt, hatred and disgrace, the said false, malicious and scandalous libellous writing, so as aforesaid framed, written and made, afterwards, to-wit, on the said 22d day of October, 1818, and on divers other days and times, as well before as afterwards, in the county aforesaid, to divers good citizens of this State, then and there present, falsely, maliciously and scandalously did openly publish, to the great scandal infamy and disgrace of the said Richard Good, against the peace and dignity of the State."

The defendant moved in arrest of judgment, because the days charged in the bill of indictment are repugnant and inconsistent, to-wit, the framing the libel is charged to have been on the 22d of April, 1819, and the publication to have been made on said 22d day of October, 1818.

TAYLOR, Chief Justice.—The objection to this indictment is, that the publication is stated to have taken place on a day before the libel was framed, which therefore creates a fatal repugnancy. It must be observed, however, that the first part of the indictment contains a distinct charge of the making, as well as publication, on the 22d April, 1819. The publication charged afterwards, is preceded by a *scilicet*, introducing a repugnant date. Now all that is necessary in regard to laying the time in an indictment, is, that the offence shall appear to have been committed before the finding of the bill, excepting in those cases where the time forms part of the offence, as in prosecutions which are limited to a certain period, and in murder, where the time of the death must be laid within a year and a day after the mortal stroke given. But generally, where the time when an offence was committed is immaterial, and it is still indictable,
(462) whether done at one time or another, there it is not traversable if alleged after a *scilicet;* and its repugnancy to the premises will not vitiate, but the *scilicet* itself will be rejected as superfluous. 1 Saund., 170. Then rejecting the date which is last stated in the indictment, for its repugnancy, together with all that is connected with it, from the words "*and that,*" to the word "*publish,*" inclusive, the offence was committed on the 22d April, 1819, which is before the finding of the bill. I am, therefore, of opinion, that the reasons in arrest be overruled.

HALL and HENDERSON, Judges, concurred.

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STATE *v.* TAYLOR.

*From Halifax.*

After an acquittal of a defendant on a State prosecution, a new trial cannot be granted.

This defendant stood charged on two indictments, which were tried in the Court below, and terminated in an acquittal of the defendant. On the trial below, the Court refused to permit certain papers to be read as evidence on the part of the State, and the Attorney General appealed.

TAYLOR, Chief Justice, delivered the opinion of the Court:

It would be to no purpose for this Court to decide, whether

the paper writings offered in evidence were properly rejected by the Circuit Judge or not; for upon the supposition that they were not, we could not grant a new trial after the acquittal of the defendant.

(463) The act of 1815, ch. 895, gives the power of granting new trials to the Superior Courts, only where the defendant is found guilty. As, therefore, the Judge trying this cause could not have awarded a new trial, we cannot reverse his judgment for having refused it. The verdict must consequently remain.

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## STATE v. GOODE.

*From Wake.*

**A receiver of stolen goods under the value of twelve pence, who is tried and found guilty, when the thief has never been prosecuted, but is running at large, amenable to process, is not liable to be punished, and no sentence can be pronounced against him.**

This was an indictment for buying and receiving of a negro slave, Essex, certain goods of the value of six pence, which defendant knew Essex had stolen, and the indictment concluded, "contrary to the form of the statute." It appeared that Essex had never been prosecuted, but was running at large, amenable to process. The Court instructed the jury to pass upon the facts, and find whether the defendant was guilty of them as charged in the bill. The jury found the defendant guilty, and the Court pronounced sentence, not according to the act of Assembly, but as for an offence at common law; from which the Attorney General appealed.

HENDERSON, Judge.—The Defendant, if guilty of any offence, is so at the Common Law; for the act of the Legislature, passed in the year 1797, ch. 19, in making the receivers of stolen goods accessories after the fact, relates to such offences only as are capable of having accessories. And that part which authorizes a prosecution for a misdemeanor

(464) for receiving stolen goods, refers to such receivers as are embraced in the preceding section. See 4 Bl. Com. Foster, 73. And according to *Goff's case*, in this Court, July Term, 1809, if he was within the provisions of this act, he could not have been put upon his trial while the principal offender was unconvicted and amenable to the process of the

Court. See Foster, 371. And I must confess, that after a very diligent examination, I am brought to believe that the act imputed to him is not punishable at all. In petit larcency there are no accessories, but all who are concerned are guilty as principals, if at all. In treason there are no accessories, for all concerned are traitors; but for opposite reasons, the magnitude of the offence in treason renders criminal in the highest degree, all who in any manner are concerned in it: their offence is not in truth and reality, as great as that of those who actually perpetrate the treasonable act; but the Law knowing no greater crime than treason, and the aider or adviser being guilty of that offence, it has no standard by which the different degrees of guilt between the two species of offences or treason can be measured or graduated: as the Law punishes with death both the robber and the murderer; not because their crimes are equal, but because robbery is thought to deserve death, and no more than death can be inflicted on the murderer. In petit larceny and smaller offences only those who are *concerned* in the *commission* of the offence—in other words, those who in higher crimes would be principals in the first or second degree, are deemed to be concerned or criminal at all, the law *barely* punishing the principals or actors, for *de minimis non curat lex.* If it is asked, how it is shewn that receivers of stolen goods are not concerned in the act, I think it is capable almost of demonstration: a receiver of the *thief* in grand larceny is an accessory, and of course a felon; to receive *the stolen goods* in such case is a bare misdemeanor, which is less than felony. In petit larceny, the receiver of the thief is neither an
(465) accessory nor a felon, it is no offence at all; therefore, receiving the goods, which is shewn to be a less criminal act, cannot be any offence at all. I cannot distinguish this case from Evans' case, reported in Foster, 73. I understand that in that case the twelve Judges decided, not only that he was not subject to transportation under the 14th Geo., but that he ought not to have been tried at all, and he was discharged accordingly. If he was not guilty under the act of Geo., if the offence of which he was convicted was a misdemeanor at the Common Law, he would have received a Common Law punishment. I am therefore compelled to say, that I can find no law for punishing the Defendant. I am aware that Hawkins says, (2 Vol.) that possibly to receive a person guilty of a bare misdemeanor, is a contempt of law,

as tending to thwart the administration of justice. He may be correct, but the books furnish no precedent of such a prosecution, for such an offence; it may possibly be a contempt of the law to receive the offender, as thereby he may escape, and the law be eluded; but to receive the goods can be made a contempt of the law in enabling the offender to escape, by a very strained construction only. But if it was a misdemeanor at the Common Law to receive goods under the value of 12*d.* yet no judgment can be given against the Defendant in this case: not at Common Law, because the principal felon has not been convicted, nor under the statute of 1797, New Rev., 847, ch. 485. That statute, so far as regards making the receivers of stolen goods accessories after the fact, can only be applied to those cases which admit of accessories. Foster, 73; *Evans' case*, 4 Bl. Com., and there are no accessories in petit larceny. But admitting that it does apply otherwise, the principal thief in this case is stated to be at large. *See Goff's case* in this Court, July Term, 1809. It appears by the preamble to the act, that the mischief intended to be remedied was the immunity afforded by the rules of
(466) the Common Law, where the principal felon *eluded* the process of the law. Where the principal did *not elude* the process, but was amenable, there was no mischief, as the Legislature conceived, and it did not in that case intend to change the law. And this construction is much strengthened by the words at the close of the first section, to wit: "which shall exempt the offender, if the principal shall be afterwards convicted." The same inconvenience existed by the Common Law rule as to receivers of stolen goods, of which it appears the Legislature was aware, by using the words, "and also make it their business to conceal such offenders;" the act then makes them accessories after the fact, and that they may be prosecuted as for a misdemeanor, and punished as set forth in the preceding clause, although the principal felon be not before convicted of said felony, which shall operate as a bar, and prevent the offender from being punished as *accessory*, if such principal felon be afterwards *taken* and convicted. From the whole of which it is quite evident, that the Legislature intended to make receivers of stolen goods accessories, where the principal offence admitted of accessories, and to punish them for a misdemeanor only where the principal offender was not *taken*: that where he was amenable, they were satisfied with the rules of Com-

mon Law; and the only alteration introduced by this act, is, by the first section, to subject accessories to trial and punishment for a misdemeanor where the principal offender *eludes* the process of the law; and by the second section, to make receivers of stolen goods accessories, (in offences capable of having accessories,) and to subject them to trial and punishment for a misdemeanor, where the principal was not taken, but eluded the process of the Law. Foster, 373.

I am, for these reasons, of opinion, that no judgment can be passed on the Defendant.

TAYLOR, Chief-Justice, and HALL, Judge, concurred

(467) Doe on Demise of ORBISON *v.* MORRISON.

*From Iredell.*

Where a part of the tract of land is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not included in both deeds, the possession of the part included in both deeds, is in him whose deed or patent is the elder; but if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby.

*Ejectment.* The plaintiff's lessor claimed title to the land under a grant, dated 21st May, 1791, and proved the defendant was in possession. Defendant claimed title by two grants, bearing date, respectively, in 1801 and 1809, and proved that he took possession by building a house on one tract and living therein, and by clearing a field on the other tract in October, 1808; and that he had retained the possession ever since, and that in both cases his possession was, upon the land, covered by plaintiff's grant. The plaintiff never had *actual* possession of that part covered by defendant's grants; but proved that in May, 1815, before defendant had held the possession seven years, plaintiff procured a surveyor to run the lines of his grant, and when they came to the defendant's lines, he forbade them to proceed, and at that time the plaintiff being on the land in dispute, claimed it as his: Afterwards, in February, 1816, plaintiff again being on the land, and in the presence of the defendant, claimed it. The suit was commenced in August, 1818. The Court below instructed the jury, that as to defendant's possession, it would

give him title, not only to that part of his grants in *actual* possession, but also to all the land included within the boundaries of his grants, unless controlled by the plaintiff's claim upon the land; and that if they believed such
(468) claim was made, it was such an entry and claim of the plaintiff as prevented the operation of the statute of limitation, and the plaintiff was entitled to recover. Verdict for the plaintiff; new trial refused; judgment, and appeal.

TAYLOR, Chief-Justice, delivered the opinion of the Court: The land in controversy is within the boundaries, both of the plaintiff's grant, and of the two grants of the defendant. The latter, however, are younger grants, and the defendant has been in possession, under them, for seven years. A question is therefore presented, which may be considered settled by very many adjudications, and which it would be dangerous now to disturb, since it is familiar to the profession, and has become a rule of property under which many titles are held. A long train of decisions, with very few to the contrary, has fixed the principle, that where part of a tract is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not included in both deeds, the possession of the part included in both deeds, is in him whose deed or patent is the oldest: but if one of them, as in this case, is actually settled for seven years together upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby. The entry made by the plaintiff, was in 1815; but the suit was not brought till 1818: it cannot, therefore, interfere with the defendant's possession. The statute of 4 and 5 Anne, c. 16, was in force in England when the act of 1715 was passed here, which was in the 2d George 1; and the latter act enforces all statute laws made for the limitation of actions, and preventing vexatious law suits. And according to the statute of Anne, there must be an action commenced within one year after the making such entry and claim, and prosecuted with effect, otherwise it is of no force to avoid the statute. There must be a new trial.

(469) DOE on demise of NIXON'S HEIRS *v.* POTTS.

*From Mecklenburg.*

**Tenants in common may recover on a joint demise.**

*Ejectment*—tried before Norwood, Judge. The lessors of the plaintiff claimed title as heirs at law of Francis Nixon, and proved that Francis Nixon died seized and possessed of the premises in question, and offered evidence that they were the heirs at law of Francis Nixon. To this evidence the defendant's counsel objected, on the ground that the demise laid in the declaration was joint, and the evidence offered was to prove title as tenants in common. The objection was overruled, and the evidence received, and plaintiffs had a verdict, A new trial having been refused, and judgment rendered, defendent appealed.

A. Henderson for the defendant.—Tenants in common cannot make a joint demise—( Runnington 94, 222—2 Wils. 234—Selw. N. P. 744—Buller N. P. 107—Cro. Jac. 166—2 Chitty's Pl. 401. )

If two tenants in common join in a lease, and this be pleaded as their joint lease, it is ill, and though it appears to the Court that it has its operation as several leases, yet the party not having pleaded it so, the Court will not adjudge it against the party's plea—(1 Ld. Ray.. 404. )

Wilson, contra.—Tenants in common may recover on a joint demise—( 2 Bac. 428—2 Wils. 232—2 Caine's Rep. 169, 174—2 Blackst. Rep. 1077.)

HALL, Judge.—In England, when tenants in common sued in ejectment, it was necessary that a separate demise should be laid by each, or that they should join in a lease
( 470 ) to a third person, who would demise to the plaintiff in ejectment; and so the law has been considered there, where tenants in common became such otherwise than by descent. In this case, it is stated that the plaintiffs are the heirs at law of Francis Nixon, and under our law of descents hold as tenants in common. I apprehend the moving reason with the Legislature, when they framed the law, was to take away survivorship, which would have followed if they had held as joint tenants. But as the law stands,

what is their real situation? They are seised *per my et per tout;* have a unity of title, interest and possession, and each may demise the whole. If so, the title which they shew supports the joint demise laid in the declaration, and judgment, I think, should be entered for them.

HENDERSON, Judge.—A lease for years is defined to be a *contract* for the *possession of land.* The title remains in the lessor: the possession of the lessee is the possession of the lessor. All actions in which the title is demanded, are to be brought against the lessor. It is a good plea in such actions, for the lessee for years to say, that he has nothing but a lease for years; and a recovery suffered, or a fine levied in an action brought wherein he is defendant, may be avoided by plea, by any person against whom such fine or recovery is offered in evidence. He is not liable to be called on to perform the feudal duties: he cannot vouch, pray in aid, nor is he considered as having anything to do with the title of the land, and there is no privity as to the title between him and the owner of the land. A recovery suffered by the owner, discharged his right to the possession; for even that existed only in *contract* with his lessor, and all these flow from one source, to wit, that his lease is a mere *contract* for the possession of the land, and as not having an interest in the title or land itself. From these principles I deduce, that tenants in common may make a joint demise, that is, a lease for
(471) years; and that it can be truly said that they did demise, that is, jointly demise; for, having a joint possession, each demises the whole possession as much as joint tenants. It is true, they cannot make a joint lease for life, gift in tail, feoffment, or conveyance in fee, for they have not a joint title, but a several one; therefore, each possesses his title in severalty: and I can account no otherwise for the uniform decisions on the subject, that tenants in common cannot make a joint demise to try title in ejectment, or that it cannot be described as their demise in pleading, than in this way: that it being established that they could not make a joint lease for life, gift in tail, or feoffment in fee, they could not make a joint demise for years, without reflecting, that in the one case a joint estate must pass to justify the description that they *conveyed*, or, which is the same thing, that they jointly conveyed; whereas, the interest which they did pass was a several and not a joint interest, they being in

by several titles; but that in a lease for years, only a *right* to the *possession* passes, and they have a joint possession, the only unity which connects them with each other. It is to be observed, that it is admitted on all hands, even in the very authorities which say that this declaration would be bad, that the interest passes, but that it should in the pleadings be called a several and not a joint demise. Were I overturning decisions which fixed the rights of property or persons, or changing in the least the rights of any individual, I would yield to such a current of decisions, but it cannot, by any possibility, affect the rights of any one. Chief Justice Kent, in *Jackson* v. *Bradt*, (2 Caine's Rep. 169,) has shortly hinted at the same principle which governs me in this decision; and although, for this and other reasons, he decided in conformity to what I think should be the decision in this case, I cannot yield my assent to any other ground which he took; for certainly the question is not, whether tenants in common can make a valid lease to pass their interests, when they join in the conveyance, but (472) whether it can be said in pleading, that they did demise. I think the declaration is good, and that there should be judgment for the plaintiff.

TAYLOR, Chief Justice, concurred in the opinion that judgment should be so rendered.

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## ERWIN *v.* SUMROW.

*From Lincoln.*

Though from the publication of a libel unexplained, malice will be *prima facie* implied, yet as the act may be innocent, and in some cases justifiable, the circumstances under which it was done, should be left to a jury.

Action for a libel. The libel was found by the defendant at his shop-door early in the morning: he carried it into the shop of a neighbor, Reinhardt, read enough of the paper to discover what it was, and handed it to Reinhardt, who read it. Defendant then proposed to burn the libel; but this was objected to by Reinhardt, who said the plaintiff ought to have it, and observed that it should not remain in his shop, and asked the defendant to take it away. The defendant did carry it away, and placed it on the window of the

shop of one Hoke, with intention, as he said, that it should be handed to Erwin, the plaintiff. Hoke's apprentice found the paper on the window shortly after it was placed there, read it, and kept it until evening, when he handed it to the plaintiff. The window on which the libel was placed, was on the street, and the paper was exposed to the view of all persons passing. Defendant's counsel contended, that if Sumrow placed the libel in the window with intention that it should be handed to Erwin, and not with a view of making it public, he was not guilty; but *Norwood*, Judge, before whom the cause was tried, charged the jury, that a (473) person being in possession of a libel, and knowing it to be such, was bound to take care that the contents of it did not become known and public by his conduct; that placing the libel in Hoke's window was a publication; and that when a publication was proved, the law implied malice, and this implication would remain until removed by sufficient evidence.

There was a verdict for the plaintiff, and a motion for a new trial: new trial refused; judgment, and appeal.

*Wilson*, for the appellant, cited 9 Co., 59: 4 Burr., 458; 4 Mass. Rep., 169.

*A, Henderson, contra*, relied on 5 Co., 126: 2 Bl. Rep., 1038: 1 Term. R., 111: 4 *Ibid.*, 127.

TAYLOR, Chief-Justice, delivered the opinion of the Court:

The essence of the charge in the declaration, consists in the malice of the publication, and the intent to defame the plaintiff; and although from the publication of a libel unexplained, malice will be *prima facie* implied, yet, as the act may be innocent, and in some cases justifiable, the circumstances under which it was done, were proper to have been left to the jury. It is the same, in principle, with an action of slander, where the defendant may give in evidence, the manner and occasion of speaking the words, and repel, if he can, the implication of malice arising from utterance. If the defendant could satisfy the jury that the paper was left in Hoke's window with an innocent intention, it would have explained what otherwise wears the appearance of a malicious publication. There ought to be a new trial.

(474) McERWIN *v.* JACOB BENNING.

*From Mecklenburg.*

When A. makes a fraudulent conveyance of his property *prior* to the recovery of a judgment against him by B., for a *tort*, B., although not a creditor at the time the conveyance was made, is entitled, after judgment, to a *scire facias* under the act of 1806.

This was a *sci. fa.* under the act of 1806, to secure creditors against fraudulent and secret conveyances of property by insolvent debtors.* The fact on which the case turned was, that the plaintiff had recovered a judgment for damages on a *tort*, against one David Benning, and that *prior* to that judgment, the conveyance, alleged to be fraudulent, was made by David Benning to the defendant. *Norwood*, Judge, who presided, on this point instructed the jury, that the plaintiff was a creditor within the meaning of the act, from the rendition of the judgment in his favor; and that if the conveyance was fraudulent against *any* creditor, whose debt was in existence at the time of conveyance was executed, the plaintiff's case would be within the provisions of the act of 1806. And if the bill of sale was void as to one creditor, it was void as to all creditors, as well those whose debts were contracted *after* the bill of sale was made, as those whose debts were in existence at the time it was made. Verdict and judgment for the plaintiff, and appeal.

*A. Henderson*, for defendant.—The defendant does not come within the act of 1806. The intention of that act was
(475) to confine the remedy to a particular set of persons, viz., *creditors*, whose debts were about to be delayed; this appears from the title to the act. The plaintiff was no creditor at the time of the conveyance. Whatever remedy he might have at common law, or under other statutes, remains to him; but under this act he has none. By the judgment he became a creditor, but not until after the conveyance. The words of the act embrace cases of contracts only.

* An act to secure creditors against fraudulent and secret conveyances of property by insolvent debtors.

Whereas, many frauds are committed by persons making conveyances upon some secret trust, and by persons concealing the property of insolvent debtors, so as enable them to avoid or delay the payment of their just debts: For remedy whereof, * * * Be it enacted, etc.

Hall, Judge.—It has been objected in this case for the defendant, that the act of 1806, (ch. 700, New Revisal,) does not afford the plaintiff a remedy; that that act only applies to creditors and debtors. 'Tis true the title of the act speaks of the fraudulent conduct of debtors, in making conveyances, to avoid or delay the punishment of their just debts; but the enacting clause declares, "that upon any judgment rendered, if the plaintiff will make affidavit, stating that the defendant has no visible property to satisfy the same, &c.; and that he has good reason to believe that the defendant has fraudulently conveyed away property, and that some other person is fraudulently possessed of it, &c., the Court may order a *scire facias* to be issued against the person so claiming it." It appears, therefore, that although the plaintiff was not a creditor before judgment rendered, yet in the words of the act, upon the happening of that event, upon making affidavit, he is entitled to a *scire facias*. In doubtful cases, the title and preamble of an act should have their due weight: in this case, I think there can be no doubt, the remedy given by the act is substituted in the room of a more circuitous one, but the rights of the parties are left as they stood before. I therefore am of opinion, that the judgment of the Court below should be affirmed.

The other Judges concurred.

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(476) M'QUEEN, agent of McGregor & Darling, *v.* BURNS.

*From Chatham.*

A, residing in North Carolina, contracted in New York a debt with B., who lived in that place; afterwards, A. paid to the agent of B. in North Carolina, a part of the debt, and credit having been given him for four months for the balance, interest at the New York rate, (seven per cent.) was calculated on the balance for four months, and added thereto, and for that sum A. gave his bond. *Held*, that this bond was not contrary to the usury laws of North Carolina.

*Debt* upon bond. The defendant purchased in New York, goods of M'Gregor & Darling to a large amount. M'Queen, as the agent of M'Gregor & Darling, settled the account with the defendant, who at that time resided in Chatham county, in North Carolina, and received from him a large payment. M'Queen then agreed that the defendant should have a credit of four months for the balance of the debt that was

due; interest at the rate of seven per cent. was calculated on the balance for four mounths, and added to it, and for that sum the bond in suit was given by the defendant to M'Queen, as the agent of M'Gregor & Darling. M'Queen resided in Fayetteville, in this State. Among other matters of defence the statute against usury was pleaded. The Court below held the bond to be usurious, and the plaintiff submitted to a nonsuit: he afterwards obtained a rule to shew cause why a new trial should not be granted; the rule was discharged, and from the judgment rendered plaintiff appealed.

*Ruffin* for the defendant.—The *lex loci* governs the interest. A debt contracted in New York bears seven per cent. interest, and perhaps a security for it executed here, but made payable there, if the creditor actually *reside in New York*, may likewise carry seven per cent. But the general rule is, that the rate of interest is to be governed by (477) the law of the country where the obligation and security is entered into. *Raneleigh* v. *Champante*, 2 Vern., 395. A bond executed in England for debt in Ireland, shall carry but six per cent. interest, which is the rate in England at the time. Hence in *Phipps* v. *Earl of Anglesea*, 1 Pr. Wms., 696, only English interest was decreed, though the debt was charged on the Earl's Irish estate, because the parties lived in England, and the securities were executed there. So in *Stapleton* v. *Conway*, 3 Atk., 727; 1 Ves., 427, Lord Hardwicke declares a mortgage made in England of a plantation in the West Indies, reserving West India interest, to be usurious. It is even doubtful whether the *actual residence* of the person to whom the bond is payable in New York, would exempt the contract *made here* from the imputation of usury; for in *Dewar* v. *Span*, 3 Term Rep., 425, upon a contract by A. to sell to B. an estate in the West Indies, and part of the purchase money was secured by the bond of B. carrying six per cent. interest, (under stat. 14, Geo. III, ch. 79,) which bond was afterwards cancelled, and a new one executed in England reserving the six per cent. this latter bond was held usurious. But here the bond is executed in North Carolina, and the obligor and obligee both live in North Carolina; and the sole question is, whether a bond given in North Carolina, by one person to another, both resident in North Carolina, is valid, though it reserve a greater interest than is allowed by the laws of North Carolina?

*Gaston*, for the plaintiff, cited 4 Day's Rep., 96.

Taylor, Chief-Justice.—It is a principle of justice, adopted and enforced by the general consent of nations, that contracts shall be governed as to their validity and construction, by the law of the country in which they were made; unless their consideration be immoral, or they were entered into with a view to their execution in some other country. This (478) rule is confined to the contract itself, and its legal effect; for the law of the forum where redress is sought, must of necessity adhere to its own forms of proceeding in administering the remedy. This rule is admitted by the defendant, in whose behalf it is contended, that the *lex loci contractus* is the law of North Carolina, inasmuch as the bond was executed here; and that as seven per cent. is an illegal rate of interest by the law of this State, the bond is void. It is true that the bond was given here; but it was to secure the payment of a debt contracted in New York, with merchants resident there, and which debt was payable there with seven per cent. until paid. It would seem strange, if the law were so, that the creditors suing in our Courts upon the simple contract, should have recovered the New York interest, which all the authorities shew, and it is admitted, they could do; whereas, by taking a bond for the purpose of securing and evidencing the debt, they shall lose the whole for contravening our usury law. That the law is not so, is shewn by a case precisely in point, cited on behalf of the plaintiff. There the debt was contracted in New York, carrying seven per cent. interest, and afterwards a security for that debt was taken in Connecticut, including the same rate of interest, both for the time then past since the debt was contracted, *and for ninety days to come*, at the end of which time it was to be paid; and it was held that the transaction was not usurious. The Court decided that the mode in which the note was taken, and the time given for payment, did not change the nature of the security for the same debt and the same interest to which the creditor was entitled by the contract. *Phelps* v. *Dent*, 4 Day's Rep. 96. I have examined every case cited in behalf of the Defendant, and I cannot see any conflict between them and the case just quoted. In *Phipps* v. *Anglesea*, 1 P. Wms. 696, all the parties lived in England; and the will and settlement were made there; it does not appear that any contract was made in Ire-

(479) land, or that any other contract was made between the parties, except the original will and settlement, certainly no new securities were taken in England. In *Stapleton* v. *Conway*, reported in 3 Atk. 727, and 1 Ves. 429, the contract was made in England, though this is rather gathered by inference from the report of the case in Atkyns; and from the same case in Vesey, it does not appear whether the settlement was made in England or the West Indies. In the book last quoted upon the West India interest being claimed, the Chancellor makes a distinction between a contract and a voluntary disposition by will or deed, and nothing said about interest; admitting the obligation of the Court to give West India interest, in the first case, but leaving it discretionary in the last. The case of *Raneleigh* v. *Champante*, as reported in 2 Vern. 395, lays down the position, that a party recovered English interest upon a debt contracted in Ireland, because the bond was executed in England. But the account of the same case given in Eq. Ca. Ab. 289, pl. 2, and Precedents in Chancery 108, is altogether different; and according to these books, the debt was contracted in Ireland, by Champante having accepted and paid bills there drawn by Lord Raneleigh, then being in England; that the latter over a bond for the balance he owed, payable in Ireland, and it was held that this bond, on a suit in England, should carry Irish interest. This account of the case, which is probably the true one, since it is referred to by the late editor of Vernon, is an authority in favour of the plaintiff. In the case of *Dewar* v. *Span*, 3 Term Rep. 425, the new bond executed by B. and D. reserved the same interest with the former one, which was usurious, because the 14th Geo. III. ch. 79, extended only to mortgages and the security respecting lands in Ireland and the West Indies, on which is allowed the foreign interest; but did not protect personal contracts. Where a contract is originally valid, and may be enforced, and a new one (480) is made which only covers it and provides for its execution, according to the first agreement, in which light I understand this case, I think it is protected by law; and that therefore there ought to be a new trial.

Henderson, Judge.—The question arising from this record is, for what was the additional one per cent. reserved? was it for forbearance, or giving day of payment? or did it grow out of an original contract? If for the first, it *may be*

usury; if on the second, it cannot be. I shall not trouble myself to prove, that a debt contracted in New York, and without reference to the laws of any other government, is governed in its exposition by the laws of New York. The original debt, then, being contracted in New York, without reference to the laws of any other government, is governed by the laws of that government, and the *rate of interest* which the debtor shall pay is part of the contract, which seems to be admitted in the present case to be seven per cent. The debtor in the State executes a note, payable in four months, for the balance of the debt, in which is included the interest, at seven per cent. up to the time the note became payable. The sum secured to be paid by the note, is precisely the sum which the Defendant would have been bound to pay if no note had been given. It became due out of no new contract; it arose solely from the operation of the original debt, and was, in fact, nothing more than giving a new evidence of that debt; and if, on the day it fell due, it was lawful for the Plaintiff to have received that sum, it certainly could not be usurious to hold or have taken a note evidencing that obligation. The additional one per cent. was therefore not taken for forbearance, or giving day of payment, but arose entirely from the original contract, which very clearly was a legal one. What rate of interest the note shall bear after it (481) falls due, the parties have not pretended to say; it is therefore left to the Law, and is not now a subject of consideration. The Defendant's counsel has offered a very ingenious argument, but I think it entirely unsound. I believe it is substantially noticed in the foregoing opinion. But I think, in his argument, the opinion of Lord Kenyon, in the case of *Dewar* against *Span*, is not understood correctly. I think that his Lordship means, that neither the original bond, or the new bond, was within the protection of the statute 14, Geo. III, under which act the contract was attempted to be legalized. That act declares, that all mortgages and securities executed in England, of or concerning lands being in Ireland or the colonies, shall have Irish or colonial interest, as the case may be. The bond was given for part of the purchase money of lands lying in the West-Indies; it bore on its face West-India interest: that bond was afterwards surrendered up, and a new bond taken, bearing also on its face West-India interest. Lord Kenyon says, that the act relied on, (to-wit, 14 Geo. III,) to support this

case, does not extend to it. He then repeats a part of the act, to wit, *mortgages and other securities*, concerning lands in Ireland and the West-Indies, reserving the interest allowed in those countries, shall be good. Now this, says he, is a *mere personal contract*, and is not within the act; evidently meaning, I think, the old as well as the new bond. He speaks of the contract as a mere personal one, not one within the act, to wit, a *mortgage or other securities concerning land;* for it would be strange that a new bond, given upon the surrender of an old bond between the same parties, in the same country, governed by the same laws, and imposing the same obligations, and no other, with the old, should be void, and the old bond legal. They both must stand, I think, or fall together. But should Lord Kenyon be mistaken as to the ope-
(482) ration of the statute of Geo. it does not affect this case. I think the Judge erred in informing the Jury that the bond was usurious; and that a new trial should be granted.

HALL, Judge, concurred.

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## WILSON *v.* SIMONTON.

*From Iredell.*

**The act of Assembly, increasing the jurisdiction of a justice of the peace to $100, is not inconsistent or incompatible with the Constitution of the State.**

This was an action of debt originally brought in Iredell County Court for twenty-five dollars, to which Defendant pleaded in abatement, pursuant to the act of 1820,* there was a demurrer to the plea. Demurrer overruled, and plea sustained. The Superior Court, on appeal, also overruled the demurrer, and sustained the plea; and Plaintiff, by his appeal, presented the question to this Court.

PER CURIAM.—The question madein this case, was decided in 1811, on argument and consideration in the case of *Keddie* v. *Moore*, 2 Murph., 41, and we see no reason to disapprove the judgment. There must be judgment for the Defendant.

*Be it enected, &c., that the jurisdiction of justices of the peace within this State be, and is hereby, extended to all sums due on bonds, notes, and liquidated accounts, not exceeding one hundred dollars.

Be it enacted, &c., that all suits hereafter commenced in the Superior or County Courts in this State, on any bond, promissory note, or liquidated account, for a less sum than one hundred dollars, shall be abated on the plea of the Defendant.

(483) CARTER, assignee, etc., SMITH, real plaintiff *v.* THE SHERIFF OF HALIFAX.

*From Halifax.*

Where A pays to the Sheriff the amount of an execution in his hands, in favor of B against C, if B afterwards assign his interest in the judgment to A, such payment shall be deemed a purchase, and not a satisfaction of B's claim.

Where an execution is levied upon property, and the plaintiff, in such execution, to favor the defendant, forbears to sell, and holds on under the lien thereby created, the property may be sold under executions of a younger date.

This was a rule on the Sheriff, to shew cause wherefore he should not return a *venditioni exponas*, Carter against Powell, satisfied. Several executions had issued, and were in the hands of the Sheriff, against Powell, returnable August, 1819. At the time the Sheriff went to levy these executions, Smith told him he would pay the money at August Court, and accordingly, on the first day of Court he did pay it, and took the Sheriff's receipt for the whole amount. At the time of the payment, both Smith and Powell expressed a wish that Smith's name should be endorsed on the executions as real plaintiff; and the Sheriff accordingly did so. Smith, at the same time, requested the Sheriff to ask the plaintiffs of record to assign over the executions to him: he did so, but none of them would so assign, except Carter, and the firm of Burrows & Shine, to whom the Sheriff paid the money for their executions. Under the executions on which Smith was endorsed as real plaintiff, and others obtained in October and November, 1819, the property of Powell was sold, and the creditors, under the latter judgments, claimed to have them satisfied, insisting that Carter's judgment had already been paid by Smith. Smith, on the contrary, contended that he had *purchased* Carter's interest, but had not *satisfied* Smith's debt.

(484) HALL, Judge, delivered the opinion of the Court:

From the facts of this case, it appears that Smith became the purchaser of Carter's judgment against Powell, and that it was his intention to do so, when he paid Carter for it, but not to satisfy the execution which had issued against Powell; and by doing so, he did injury to no one. It does not appear what the Sheriff's return on the execution was, but is more than likely it was returned, levied on Pow-

ell's property; because from the next Court a *venditioni exponas* issued, also other executions issued from the same Court, on behalf of other creditors, who claim to have their executions satisfied in preference to Carter's execution, which belonged to Smith. This cannot be done; because Carter's execution was first levied on the property, and the lien thereby created, remained until it was sold under the *venditioni exponas*, unless, indeed, there was some fraud practiced by Carter or Smith; but no fraud appears, because the plaintiffs, in those executions, are not in a worse situation than if Powell's property had been sold under the first execution that issued against him: 'tis true, where an execution is levied upon property, and the plaintiff, in such execution, to favor the defendant, forbears to sell, and holds on under the lien thereby created, the property may be sold under executions of a younger date; but that is not the case here; because at the time the indulgence was given to Powell, by the plaintiff, no other exection had issued against him. After other executions issued, no indulgence was given.

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(485) MYRICK *v.* BISHOP.

*From Halifax.**

Possession alone is sufficient to maintain trespass against a wrong-doer.

*Trespass quare clausum freget.* The plaintiff exhibited on the trial below, a deed dated in 1812, to himself, including within its boundaries the *locus in quo*, and shewed that he was in actual possession of a part of the lands, and had been, but for a term of less than seven years; and the trespass complained of was on the uncultivated part of said land, and on a part of which he had no actual occupation. The defendant shewed no title or possession, but insisted that the *locus in quo* was vacant land.

The Judge charged the jury, that if the land was vacant, the plaintiff could not have such a constructive possession under his deed as would enable him to support an action of trespass; but whether the *locus in quo* was vacant, he left for the jury to say: that if the land had been granted, then the

*This cause and the two immediately following it, were decided at June Term, 1821, but from accident were omitted in the report of the cases of that Term.

plaintiff had a deed covering the land, and an actual possession of a part, though for less than seven years, and this gave him such a constructive possession of the whole, as would enable him to support an action of trespass against a wrong-doer.

TAYLOR, Chief-Justice.—The Plaintiff, having a deed covering the land where the trespass was committed, and being in possession of part within the boundaries of the deed, was in actual possession of the whole. The deed ascertained the extent of the possession. Whoever is in possession, may maintain an action of trespass against a wrong-doer to his possession, because it is a possessory remedy, founded merely on the possession, and it is not necessary that the right (486) should come in question. 3 Burr. 1563, 1 East 246. The judgment must be affirmed.

HENDERSON, Judge.—Possession alone is sufficient to maintain trespass against a wrong-doer. 1 East 244, *Graham* v. *Peat*, and the cases there cited, to-wit, 3 Burr. 1563, 2 Stra. 1238, Willes 221. And it is consistent with first principles, and in fact would be strange if it were not so; for wretched would be the policy which required the title to be shewn in every instance where the peaceable possession was disturbed by an intruder who had no right. It would tend to broils and quarrels, and the possessor would resort to force to defend his possession, if the law afforded him no redress. It cannot, therefore, for a moment be doubted, that the law is as stated above; and for myself, I would go farther, although my brethren do not deem it necessary to express an opinion on the point, that possession is *prima facie* evidence of title, and until the contrary shall appear, sufficient to maintain an action on the title against a wrong doer, *ex. gr.* an action of ejectment. This of course has reference to a case where the title is shewn to be out of the State. I do not deem it necessary to say anything on constructive possession, for in the case before us, the plaintiff's possession was an actual one; possession of any part of a tract of land, there being no conflicting occupation, is an actual, and not a constructive possession, of the whole tract. If any part is adversely occupied under an inferior title, the possession under the good title extends to the actual adverse occupation. Here there was no adverse occupation, and the actual possession of the

plaintiff was co-extensive with his deed. A constructive possession is where a person has title, but no possession, and there is no one in possession, it being vacant; there the title draws to it the possession *in law*, or by *construction* of law.

I think the rule for a new trial should be discharged, (487) and judgment entered for the plaintiff.

HALL, Judge, concurred that judgment should be so rendered.

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## STATE *v.* FARRIER.

*From Johnston.*

In an indictment for sending a challenge, it is not necessary to set out a copy of the challenge; and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no ways altering the sense, *semble*. such variance is not fatal, and, after verdict, it is cured by the act of 1811.

A challenge to fight a duel *out* of the State is indictable, for its tendency is to rouse the passions, and produce an immediate breach of the peace.

This was an indictment for sending a challenge to fight a duel, tried below before *Nash, Judge.* The indictment was as follows:

"The jurors for the State upon their oath present, that James Farrier, late of the county of Johnston, attorney, on the twentieth day of September, in the year of our Lord one thousand eight hundred and twenty, with force and arms, at and in the county of Johnston, wickedly and maliciously intending and designing, as much as in him lay, not only to disquiet and terrify one John M'Leod, but also the said John M'Leod, maliciously, violently and wickedly to kill and murder, did unlawfully and wickedly provoke and excite the said John M'Leod to fight a duel against him the said James Farrier, with pistols, or some other dangerous and mortal weapons; and that he the said James Farrier, a certain challenge, in the name of the said James Farrier, in the form of a letter to the said John M'Leod directed, did then and there maliciously write and cause to be written; which said challenge, so as aforesaid written and directed, he the said Farrier afterwards, to-wit, on the said twentieth day of September, in the year of our Lord one thousand eight hundred and twenty, at and in the county of Johnston aforesaid, maliciously and wickedly, to the said John M'Leod did send and contrive to be delivered, and cause to be sent and delivered, and which said (488) challenge in the form of a letter is as follows, that is to say:—

'Smithfield, Sept. 20, 1820. Mr. John M'Leod—Sir: Since our last interview, in which we talked over the *differences* between us, and in which you called on me to explain why I should say that I would as soon vote for Jim, the barber, as you—I say, since then I have seen

Gen'l Bryan, of this county, who informed me that you, in explanation of the cause of this difference between us, had said, that it was likely owing to a very unpleasant request that you had made to me at the instance of your ward, to forsake your house; and your reason for doing this was, as defeated lovers sometimes prove desperate, you thought there was some danger to be apprehended from me; and if I be the defeated lover, there really will be some danger to be apprehended, and your words verified, but not in the sense you intended. Instead of my revenge being directed against an innocent lady in the exercise of her right, it shall be directed towards a man who has thus causelessly thrown a reproach on the character of the innocent, in order to palliate his own improper conduct. You say that your ward imagined to herself that I had a dirk, and intended making an attack on her person: permit me to tell you, that I do not believe your ward ever *immgined* any such thing, neither do I believe that she ever told you so. So this story about the dirk never existed anywhere else than in your own imagination, for some cause best known to yourself: and remember, he that carrieth a dirk in his imagination, carrieth poison in his heart. I once cherished the hope that this storm of *clumny*, this spirit of evil reports which has so long raged between you, your family, and myself, would ere this have ceased; but all hope is now lost of there ever being a revival of our former intimacy. The affairs as they now stand between us, may be worse, but I will assure you there is little probability of *there* being better. Since my memory, my character has never suffered such a gross, unjustifiable and unprecedented attack. It may be credited by those who are unacquainted me, but those who are acquainted with my former conduct, will give it but little credit; and if it is not credited by a solitary person, my feelings will not permit me to pass it over in silence, and let it sink into the tomb of oblivion without revenge. I therefore ask of you to render that opportunity of redress which one gentleman is bound to render to another, whenever he thinks himself aggrieved; and in making this my request, you are not to presume that I acknowledged you a gentleman, for I do not consider you as such, neither do I believe you are known to the world in that character; yet for the purpose of redressing my wounded feelings, I am bound to ask you once for your lifetime to act the part of a gentleman, in accepting this my invitation to leave the State, in respect to the peace of North Carolina.—JAS. FARRIER. N. B. This letter will be lodged in David Tompson's store, for your reception, and if handed to you, the person handing of it will be unacquainted with its contents. The calls of my professional affairs prevents me from being in town for a few (489) weeks; my friend Doc. White, who will call on you for an answer to this letter, will do me the favour of receiving any communication from you yourself to me, during my absence.' To the great damage of the said John M'Leod, to the evil and pernicious example of all others in the like case offending, contrary to an act of the General Assembly in such case made and provided, and against the peace and dignity of the State."

On the trial, the introduction of the original letter was opposed, on the ground of variance from the letter as set forth in the indictment: the variance consisted in the words *differences* instead of *difference*, *immgined* for *imagined*, *clumny* for *calumny*, and *there* for *their*. The objection was overruled, and the letter received. It was then contended, that the let-

ter set forth was not a challenge to violate the peace of *this* State; and therefore, without such intention, the defendant was not guilty of the crime stated in the indictment. The Court instructed the jury, that under the law of the State, the act of sending a challenge to fight a duel in another State would render the defendant guilty of the charge in this indictment. The jury found the defendant guilty; a new trial was refused, and from the judgment pronounced, the defendant appealed.

TAYLOR, Chief Justice, delivered the Court's opinion:

The defendant was indicted for sending the proseeutor a challenge to fight a duel. The act of 1802, which alters the common law punishment, does not change the nature of the offence which consist in sending a challenge, either by word, or by letter, to fight a duel. Upon the trial of the cause, the letter, containing the supposed challenge, was offered in evidence, but objected to by the defendant on the ground of several variances from the statement of it in the indictment; it was, however, admitted by the Court, and proved, and read to the jury. It was further insisted, in behalf of the defendant, that the letter was not a challenge to violate the peace of this State; and that without such intent, the defendant could not be guilty of the offence charged in the indictment.

To these objections, which appear on the record, it has
(490) been added in the argument here, that the indictment charges the defendant with an intention to provoke the prosecutor to fight a duel with pistols, or some other dangerous and mortal weapons, whereas, the letter specifies no weapon; and if its real meaning were to fight with weapons, the recital of the letter should have been accompanied with proper inuendoes to enable the jury to affix a judicial sense to it. The same observation has been applied to the letter in relation to its being a challenge to fight, and to leave the State, a construction, it is said, which can only be put upon it, by understanding something not expressed in direct words.

1. The fact to be enquired into by the jury, was, whether the defendant sent a challenge to fight a duel? The evidence relied on to establish the fact, was the letter written by the defendant. But if no letter had been written, the fact might have been proved by other means, since neither the common

law, nor the statute, requires a challenge to be in writing, in order to constitute a crime for sending one.

To recite the letter in the indictment, is to set forth the evidence by which the fact is meant to be proved, and does not, upon principle, seem to be more essential than, in case of a verbal challenge, it would have been, to set out the particular language in which the challenge was created. The law requires no more than that a complete offence should be shewn in every indictment, so as to enable the Court to give judgment upon it, in case a demurrer were joined, or a writ of error brought. Upon this principle it is, that indictments for sending threatening letters must set out the letters themselves, in order that the Court may see whether they are of that kind which the statute renders criminal: the same rule extends to forgery; the instrument charged to be forged must be set out *verbatim*, in order that the Court may see that it is such an instrument as the prohibition of the law extends to. But if the defendant had been simply
(491) charged with sending a challenge to fight a duel, without any recital of the letter, the introduction of which, as evidence, however, had satisfied the jury of the fact, and enabled them to pronounce a verdict of guilty, the Court must have seen upon the face of the indictment, that a crime had been committed, and the specific degree of it pointed out, so as to enable them to apply the punishment annexed by the act of 1802. Supposing, however, that the recital of the letter is not merely a compliance with custom, but required by principle, it will admit of serious doubt whether the variances are fatal, even according to the English authorities, which, Lord Mansfield says, have been carried to a great degree of nicety indeed. The rule laid down in Dr. Drake's case (2 Salk., 660), was, that if an indictment undertakes to set forth the tenor of an instrument, though a literal variance is not fatal, yet if the mutilated word makes any other word, as *nor* for *not*, it is fatal. This was decided on a special verdict, where the Court, looking at a record, can presume nothing, but is bound to pronounce the abstract proposition of law But common sense seems to dictate, that the enquiry before a jury should be, whether the words used in the indictment signify the same thing, although misspelt and mutilated, with those in the letter; and that a variance, no ways altering the sense of the letter, ought not to be fatal, according to the rule in reciting a statute, where the words

*sea* of Rome were used for *see* of Rome—(1 Vent., 172.) Accordingly, in the *King* v. *Beach* (Cowp., 229), which came before the Court, on a motion to arrest the judgment on the ground of variance between the indictment and affidavit, the word *understood* being written without the *s*, Lord Mansfield concludes his opinion by saying, "this is a case where the matter has been fairly tried, and where the omission of the letter *s* certainly does not change the word; therefore, we are all of opinion that the jury were very right in reading it *understood*. In the case of the *King* v. *Hart* (1 Leach, 172), (492) it was also left to the jury to consider, whether the word *received*, in the indictment, signified the same thing with *received* in the bill of exchange. The prisoner was convicted, but the judgment was respited, for the opinion of the Judges, who thought it to be a proper question for the jury. In these cases, the jury must have judged of the meaning from the context; and the principle upon which they are decided, would seem to warrant the jury, in this case, to have found as they have done, that *differences* signified the same thing with *difference*, *immgined*, *imagined*, *clumny*, *calumny*, and *there*, *their*. In relation to the last word, there is a remark of *Powell*, Judge, in Holt's report of *Dr. Drake's case*, which is worthy of notice, "that he did not mark this to be so small a variance of a letter, as if it had happened in false spelling or abbreviation." Now, if a word should be changed by false spelling into another word, but one having the same sound with that for which it was written, it cannot be difficult to judge from the context what the meaning is, as in the sentence where *there* is put for *their*. If, however, these inferences should not be correctly drawn, and the strict rule, laid down in *Drake's case*, is to govern where the jury has passed upon the meaning of a paper, we are satisfied that the act of 1811 applies to the case, and cures the informality. It is a refinement, in the sense of that act, and there does appear to the Court sufficient, in the face of the indictment, to induce it to proceed to judgment. If the Court were not to listen to that act upon this occasion, they might be justly charged with being deaf to the legislative voice, and permitting that "disease and reproach" of the law yet to remain, by which a person, convicted of an offence, may seize upon the merest *apices litigandi*, to evade the punishment.

2. A challenge to fight a duel out of the State, is indictable for the same reason that a challenge to fight in the

(493) State is, because its tendency is to break the peace of the State. Its natural and probable effect is, to excite instant irritation and animosity, and to rouse the passions to an immediate breach of the peace.

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## WEST *v.* KITTRELL.

*From Bertie.*

Where a suit is commenced in the County Court, and removed by *consent* into the Superior Court, such removal is good, provided the suit be one of which the Superior Court may entertain jurisdiction.

The County Courts have the same powers with a Court of Equity, to rectify mistakes in the settlement of a guardian's account, provided the mistakes be clearly shewn.

This was a petition originally filed in the County Court of Bertie, in February, 1818, setting forth that Kittrell, the defendant, had been appointed the guardian of the petitioner, and as such had taken into his possession property to a large amount, and received the rents and profits thereof, until the petitioner came of age:—that soon after this period, on the request of the petitioner, a settlement took place between him and the defendant, of the guardianship accounts of the defendant, and the petitioner gave to the defendant a receipt in full for the sum of ---- dollars, which, from the accounts, appeared to be due:—that on submitting these accounts to counsel, he was informed, that there were in them many errors of law as well as fact, and that he was entitled to a large sum over and above that already received:—that the petitioner applied to the defendant, explained to him the errors, and requested him to correct them, and pay over to the petitioner what was justly due to him, to which the defendant replied, that the receipt he had was a sufficient (494) discharge, and refused to settle the account again.

The petitioner charged, that the receipt was given under a mistake of the facts, and a misrepresentation of the law, and concluded with a prayer, that defendant might be compelled to answer and state a true account, for general relief, and for process.

The defendant pleaded in bar, that pursuant to a proposition made by the petitioner, three persons had been selected to settle the guardian account of the defendant, and that the petitioner was then of full age; that the referees reported a

balance due the petitioner of £826 2*s.* 7¾*d.* which the petitioner, after examination, approved, and received the defendant's note for the said sum, and in writing acknowledged that to be the true balance due.

Afterwards, at May Term, 1818, of Bertie County Court, the parties consented to remove the cause to the Superior Court of the county; and at the Fall Term, 1819, the defendant's plea was overruled without prejudice, and the petition was amended by leave of Court.

The amended petition specifically pointed out the mistake in the settlement which had been made, as consisting in a charge against the defendant for simple interest only, when it should have been for compound interest. It further states the ignorance of the petitioner in matters of account, his mistake, and that he was under the influence of his guardian, the defendant.

A copy of the petition and amendment, with subpœna, having been served on the defendant, at the Fall Term, 1820, a judgment was entered *pro confesso*, and the cause was set for hearing *ex parte*. At the Spring Term, 1821, the defendant, on the cause coming on to be heard, moved to dismiss the petition. The Court refused the motion, and from the decree pronounced, the defendant appealed.

HALL, Judge.—The first objection made by the defendant's counsel, is, that the suit was carried into the
(495) Superior Court by consent of the parties, and not by way of appeal, or in any other way known to the law.

The answer to this is, that the Superior Court had jurisdiction of the subject-matter of the petition, and the petition and plea were entered on the docket of that Court by consent of parties, which might have been done, and the Court would have had jurisdiction of it, if the suit had never been in the County Court.

It is again objected, that the dispute had been referred to arbitrators, to settle, and they have made an award which ought to be binding on the parties. It does appear that there was a reference to three persons to state and settle the guardian's account, that they did make a statement of the account, and found a balance in favor of the petitioner; but I think the reference was made merely for the purpose of having the accounts examined and reported upon, rather than that any award should be made that should be obligatory

on the parties. And I am the more inclined to think so, because the Defendant himself states that the petitioner did approve and allow of the accounts so stated, after examination. If it had been an award in the sense insisted upon, it could not owe its obligatory force to the examination of the petitioner.

It is further objected, in argument for the Defendant, that although the County Court has jurisdiction in all cases of filial portions, &c., according to the act of 1762, ch. 5, in a summary way, yet that such jurisdiction and mode of proceeding are additional to the Common Law jurisdiction, (which, alone, the County Courts exercised before,) and to the Common Law jurisdiction of the Superior Courts; and that even admitting an error has been committed in the settlement of the guardian's account, and pointed out by the petitioner, yet that the Superior Court has not jurisdiction, because that error is protected by the petitioner's receipt,

( 496 ) which has been given in full discharge of his demand, and that it is only competent for a Court of Equity so far to remove it out of the way, as to correct that error.

I think it was not the intention of the Legislature, in giving this jurisdiction to the Common Law Courts, which before belonged to the Courts of Equity, to alter any principle, or delegate less power than was possessed by the Courts of Equity, when questions of this sort came before them. The remedy (except so far as it may be altered by the act of 1762) is transferred with the general power given, and is incident to it. Indeed the Legislature seems to have been fearful, that the jurisdiction thus given, might be construed a complete transfer of jurisdiction from the Courts of Equity, when they declare, in sec. 26 of the act of 1762, that nothing in the act shall be considered as restraining or abridging the powers of the Courts of Equity, but that they shall continue to exercise them in the same way as if that act had never been passed.

I therefore think the County Court had the same power to enquire into and correct the error pointed out by the petitioner in his amended bill, as a Court of Equity would have if the question had arisen there; and of the power of a Court of Equity to rectify mistakes after a receipt has been given, provided those errors and mistakes are distinctly and clearly pointed out, no one will doubt. The Defendant has not answered the allegation of the petition, pointing out the error

complained of by the petitioner; he therefore admits it, and it only remains to say, that the decree of the Superior Court shall be affirmed with costs.

The other Judges concurred.

(497) RYDEN *v.* JONES.

*From Craven.*

An executor shall not be permitted to become a purchaser at a sale made by him as executor, notwithstanding such sale be public, necessary, fair, for full price, and that those interested were present and assented to the sale.

This was a petition, filed originally in 1816, in the County Court of Craven, by James Ryden, administrator of Elizabeth Ryden, and Mary Savanoe, shewing that Michael Hyman the younger, being seized and possessed of a large real and personal property, in 1793 duly made and published his last will, whereby, after some specific legacies, he gave all the residue of his estate to his four sisters, Margaret wife of Peter Vendrick, Sydney wife of Edward Bowen, Mary Savanoe the petitioner, and Elizabeth Ryden the intestate of the petitioner James. Of this will he appoined James Hyman executor, who qualified and took into possession the personal property of his testator. The petitioners stated, that among other personal property not specifically bequeathed, was a negro slave named Frank, which Hyman, the executor, pretended to claim as his own property, whereas it belonged to the estate of his testator, and the residuary legatees were entitled to distribution of the said negro, and of the profits of his labour from the time of Michael Hyman's death:—that James Hyman died without making any settlement of his accounts as executor, but leaving a last will, whereof he appointed Jones, the defendant, executor, who qualified and took into his possession the assets of Michael Hyman left unadministered by James Hyman, and also the assets of James Hyman:—that Jones also took into his possession, and retained and employed the negro slave, Frank, and received large sums as the profits of his labour:—that James Hyman, in his lifetime,
(498) and Jones, since his decease, had satisfied the claims of Peter Vendrick and Edward Bowen, but refused to make any satisfaction to the petitioners for their shares. The

petition prayed, that Jones might set forth an account of the assets of Michael Hyman, that came to his hands and to the hands of his testator James: that he might answer especially, whether Frank was not part of the estate of Michal Hyman: that Frank might be sold or valued, and the petitioners receive their respective shares of his value; and that a full account of the distribution or application of the estate of Michael Hyman, by James, might be shewn.

The answer of Jones stated, that he had no knowledge which would enable him to say what assets of Michael Hyman came to the hands of James, but referred to the returns of James Hyman, made to Craven Court:—that he, this defendant, never had any assets of Michael Hyman in his hands, to his knowledge or belief:—that his testator, James, had paid and satisfied Lewis Savanoe, husband of the petitioner Mary Savanoe, whatever legacy, right, interest, or demand, she had, and had the release of said Lewis and Mary to produce:—that he was ignorant whether James Hyman ever settled with Elizabeth Ryden and her husband Benjamin, or either of them, for any claim they might have under the will of Michael Hyman, or not:—that as to the slave, Frank, he had understood and believed that he was part of the estate of Michael Hyman, sold by James Hyman as his executor, and purchased fairly, at a public sale of the effects of the said Michael, on credit, by Philip Turner, to the use of James Hyman, who had charged himself with the purchase money, and accounted with all the persons named as interested therein, save Elizabeth Ryden:—that James Hyman, by will, gave Frank to Fanny Hukins; and that Frank came to the hands of the defendant as James Hyman's
(499) property; and that as executor, he had disposed of him, and was ready to account with any person lawfully entitled to call on him.

On the several issues submitted to the jury, they found the facts to be as follows: That the negro Frank was sold at public auction by James Hyman, as executor, and purchased by Philip Turner, for said executor, in March 1794; that the sale was fair and necessary, and that the slave brought his full value; that all the residuary legatees of Michael Hyman were present at the sale, except Savanoe and his wife, and that all the persons entitled to distribution in the negro, assented to the sale. They further found, that Elizabeth Ryden died two or three months after the sale; that James

Ryden obtained letters of administration on her estate, in September, 1816; that she was covert at the time of the sale, and at her decease; that Benjamin Ryden, her husband, died in the year 1797; that letters of administration on his estate were granted to James Hyman, in September, 1797; and that Benjamin and Elizabeth Ryden left three children, James, the petitioner, Gatsey, and Elizabeth Ryden, the last of whom was at that time eleven years old. That James Hyman made a settlement of his accounts, as executor of Michael Hyman, in March, 1796; that on the 6th of January, 1794, he returned an account of sales, which was signed by the then Sheriff of the county.

On this finding, it was considered by Norwood, Judge, who presided below, that the petitioners take nothing by their petition, but that the same be dismissed; whereupon the petitioners appealed.

*Hogg* and *Hawks* for the petitioners; *Gaston* for the defendant.

*Hawks.*—The case presents two questions: 1st. Can an executor acquire title to a slave, of the assets of his testator, by a purchase at his own sale? To this we answer, he cannot, notwithstanding the jury found, on the issues submitted to them, that the sale was at public auction, necessary, (500) fair, and for a full price, that most of the residuary legatees were present at the sale, and among others the petitioner's intestate and her husband Benjamin Ryden, and that they assented to the sale. It is the settled rule of Equity, that a *trustee* cannot purchase of his *cestui que trust*, and if he does, the sale will, *as of course*, be set aside. This rule is founded in public policy, and is intended to deliver trustees from the temptation of interest. It matters not, therefore, what degree of fairness or publicity may attend the sale in any particular instance. It is the intent of the law, that the trustee shall exert himself to make the best sale, and to that end, he shall disclose the full value of the property. If he be permitted to become the purchaser, it is impossible to suppose that he will be very anxious that competitors shall know all the advantages of the property, or that the terms of the sale should tend to enhance the price. The rule is preventive of frauds; itensures the good faith of the trustee, by divesting him of the character of a purchaser, and by allowing the *cestui que trust* an option in *every*

case to have the sale declared void or not. The doctrine contended for is illustrated by very many adjudications, and has been applied to every species of trust.

A sale by a trustee *at auction* will not be supported. *Campbell* v. *Walker*, 13 Ves. 602 Sugden 427.

The *necessity* for a sale will not affect the general rule. *Owen* v. *Foukes*, 6 Ves. 630, *in notis*.

A *fair price* will not protect the trustee in his purchase. *Randall* v. *Errington*, 10 Ves. 428.

The rule is not affected, either, by the *assent of a majority* of those interested. Lord Hardwicke, indeed, intimated that it would, in *Whelpdale* v. *Cookson*, 1 Ves. 9, saying, that if a majority of the creditors agreed to allow the sale, he "*should not be afraid of making the precedent.*" This was held by Lord Eldon to be erroneous, in *Ex parte Lacey*, 6 Ves. 625–8, *Ex parte James*, 8 Ves. 337.

(501) The *assent* of Benjamin Ryden even does not take the case out of the rule. 10 Ves., 427–9; 13 Ves., 602–3. It is observable, that in this latter case the purchase was made, as in the case before the Court, by an *agent*. In many of the cases referred to, the purchases were made by trustees *from the cestui que trust*—the *cestui que trust* must of course have assented, and yet the purchase has been set aside.

The rule has been adopted in New York in all its rigour, and the whole of the cases are examined by Kent, Chancellor, in *Davoust* v. *Fanning*, 2 Johns. Ch. Ca., 252, and it has received the sanction of the Courts of our own State. *Mealor* v. *Kimble*, 1 Law Repos., 255; *White* v. *Brown*, 2 Law Repos. 447.

The second question is, whether the lapse of time from 1794 to 1818, is sufficient in Equity to bar the Plaintiff's relief? It appears from the case, that Elizabeth Ryden was a *feme covert* until her death in 1794; her husband, who survived her, became entitled to her equitable choses in action; he died in 1797, and the executor, who was bound to account with his representative, became himself administrator, so that the same person was bound to receive and to pay, and there could be no laches. But the answer obviates all difficulty as to lapse of time; it does not set up either payment or length of time as a defence, but admits the petitioner's right to recover, and avers a readiness to settle, but insists that Defendant should account only for the price of the slave. This is a waiver of laches, and an admission of an open trust,

and the validity of the sale is the only point made by the pleadings in the case.

*Gaston, contra.*—The rule contended for never had application to the case of a controversy between executor and residuary legatees. An executor is not a mere trustee to sell, and pay the proceeds to his *cestui que trust*, but is qualified owner of the goods of his testator. Toller, 101–2–3. (502) He may give, assign, release, sell, if there be no fraud in the transaction. If a trustee alien without consideration, or with notice, the purchaser becomes trustee. It is not so with the alienation of an executor: if he use the goods of his testator as his own, they may be taken in execution for his debts. *Whale* v. *Booth*, 4 Term Rep., 623; *Quick* v. *Staines*, 1 Bos. *&* Pul., 293

He is only liable for the *value* of what he received, and makes the *chattels* of the testator his own, by paying the value. Toller, 108, 185; Plow., 185–6. An executor is never liable when fairly intending to do his duty. 2 Madd., 114. And to residuary legatees he is liable for value. *Ibid*, 127–8. Residuary legatees have no right to question the disposition of assets. 1 Madd , 230. It is only when he violates a trust, that he is answerable for more than the value, and then is simply not permitted to *make gain.* 4 Ves., 622.

As to the cases relied on, they are all cases of *real* estate, and no instance can be shewn of the application of the rule to executors, *as such:* against such an application are. 2 Hen. & Mum., 261, 265; 4 *Ibid*, 430; 1 Dessaussure's Rep., 567.

The only doubt in our country has been, whether an executor is liable for the full value, if purchased for less, in the manner pointed out by law. (See act of 1723; *Tomlinson* v. *Delastatius*, 2 Hay., 284.

The rule insisted on is of modern date in England. The ancient rule was, that a trustee might buy at a *public* sale, if it were done fairly, and for value, unless a majority of those interested should object. 1 Cruise's Dig., 551–2; Sugden, 426–7; *Whelpdale* v. *Cookson*, 1 Ves., 9; 5 Ves., jr., 682. And the fact is avowed, that the rule now applied is different from the former rule, and has grown out of considerations of policy applicable to Great Britain: but at no time, and in no country, would the application of the rule, under the circumstances of this case, be granted.

(503) The petition is brought by the representative of the residuary legatee, who must do justice before he can get it. The transaction sought to be set aside is honest, took place twenty three years before the petition was filed, was assented to by all interested, and is now to be invalidated because of subsequent contingencies, and to be invalidated to the ruin of an executor who has done his duty. Length of time is an objection; the sale was made in 1794, the account of the sales filed immediately, the estate was settled in 1796, and the balance due Ryden was ascertained, and in 1797 he died without having administered on his wife's estate—(5 Ves. 682—1 Caine's Cases in Error 20.) But the transaction cannot be set aside if done by *universal* consent —(6 Ves. 630—8 *Ibid.* 352.)

*Hogg*, in reply.—The rule, that a trustee cannot purchase, is admitted; but it is said that it does not apply to executors, and it is insisted that much difference exists between a mere naked trustee and an executor who has an interest, and may acquire property in a personal chattel of the testator, if the executor be a creditor, or if he advance money in the payment of debts. It is not alleged in the answer, nor does it appear in the case, that the executor was a creditor, or that he was in advance He claims as a purchaser only, the specific difference pointed out, therefore does not exist in this case, and it is not necessary now to decide, whether an executor in this State can become the owner of a chattel which he is by act of Assemby directed to sell on credit. It is an inversion of sound argument to suppose, because the executor has greater power over the property of his *cestui que trust*, that the law should be *less* vigilant to prevent its abuse. The confidence between executor and creditor and legatee, is of the most frequent occurrence, affords great temptation to abuse, and admits a strong probability of concealment. It is for the defendant to shew that a rule to prevent (504) frauds in trustees, has or can be dispensed with in the case of executors. The case of *White* v. *Brown*, before cited, is the sale of a *slave* and a purchase by the executor, and is a decision of this Court in point. It is said however, the rule is of modern origin and should not obtain in this State, that it has been deen departed from in Virginia, and two cases are cited from Hening & Mumford. Most of the cases relied on by the petitioner, though not all, have

been decided since our revolution, but it is no where pretended that the rule laid down in them is an innovation: they are declaratory of what the law has been and is, not of what it shall be. But whatever may be the law in Virginia, decided in indulgence to what has been the *practice* of that State, it will scarcely afford a safe precedent for this Court in departing from a rule adopted by themselves, founded as it is in the wisest policy, and sanctioned by the decisions of the greatest men that ever presided in Chancery Courts. The *assent* found by the Jury is much relied on; a *feme covert* could not assent, it is a finding against a legal disability; neither does assent make any difference, for it must always have been given by *cestui que trusts sui juris* in sales to their trustees, and yet these sales have always been set aside. As to lapse of time it has already been met in the opening argument.

On another day, Hogg read a case from 1 Johns. Ch. Ca. to shew that Kent considered an *executor* within the rule that disabled a trustee from being a purchaser.

TAYLOR, Chief-Justice.—It has now become a settled rule of equity, too firmly established to be shaken that a trustee shall gain no benefit to himself by any act done by him in his fiduciary character; but that all his acts shall be for the benefit of the *cestui que trust.* It is not necessary in the view I take of the case, to enquire whether an executor comes within the rule as established in England, though in (505) the case of *Barden* v. *Barden*, 18 Ves. 170, it was decided that an executor cannot purchase his testator's effects; because our local laws have materially changed the rights and duties of an executor. The act of 1723, ch. 15, explained and modified by several subsequent acts, restrains the executors from selling the unperishable estate without an order of Court; and as the law now stands, the County Courts are to judge of the necessity of a sale either to make distribution or to pay debts. It has not entrusted the executor with the power of selling at his own discretion; nor is it any justification to him, acting without an order of Court, that the sale was just and necessary. This however does not change the principle on which the law considers void a purchase made by a trustee, for it would still be so if the sale was authorised by an order of Court. The general tendency

of our acts in this respect is rather to limit than enlarge the powers of an executor, and shews that the doctrine relied on by the petitioners applies *a fortiori* to them.

The length of time cannot have an effect on the petitioner's rights under the circumstances of the case. It is an open unexecuted trust, and it is not pretended that the share of the price for which Frank was sold, has ever been paid to Elizabeth Ryden, or her representatives.

HALL and HENDERSON, Judges, concurred.

# IN CHANCERY.

(509) IN EQUITY.

FOSTER *et al. v.* COOK.

*From Franklin.*

A bill in equity may be framed in the alternative with a double aspect, and a relief may be granted in either case, as circumstances may require. And relief may be given under the general prayer in a bill, provided it be in accordance with, and not contradictory to the particular relief prayed for.

This was a bill filed by the heirs of one Daniel Foster, to set aside a conveyance of land and a negro, from said Foster to the defendant, which, as they alleged, was fraudulently obtained. The prayer of the bill was, to have the conveyance set aside, and a decree for a reconveyance, and it concluded with the general prayer for relief.

The defendant, in his answer, denied the facts set forth in the bill, as to fraud in obtaining the conveyance; and the facts, on the responses of the jury to the issues submitted, appeared to be these. The defendant, as the confidential friend of Foster, undertook to assist him in the management of his business: while acting thus as his friend, he purchased, fairly and *bona fide*, of Foster, a tract of land and a slave: the land was of the value of $1420, and the slave was worth $400: the consideration for the sale was $1400 and the support of Foster during his life: of the $1400, the sum of $991 was paid, the balance remained due, and the support of Foster during his life was worth $420. On these facts, defendant moved to dismiss the bill, on the ground that complainants' remedy was at law. The Court refused to dismiss, and decreed that the defendant pay to complainants $515.46, the balance of the purchase money, with interest on $409, and all costs. Defendant appealed to this Court.

(510) *Seawell*, for the complainants, contended, that although there was a prayer for specific relief, yet other relief might be granted, if consistent with the case made. 1 Johns, Ch. Ca., 117; 3 Atk., 132.

That a person standing in the relation of an attorney, cannot avail himself of an advantage thereby acquired, and that

this defendant stood in that situation. 4 Brown, 351 ; 2 Atk., 27.

That this defendant was to be considered as a trustee, and therefore could not purchase at his own sale. 3 Ves. Jr., 740.

If a person be employed as a friend to prevent another from being imposed on, *taking a bond* of the other *is of itself* fraud, and equity will relieve against it. *Osmond* v. *Fitzroy*, 3 P. Wms., 129.

*Ruffin, contra.*—The de ree for the balance of the purchase money cannot stand. The specific prayer of the bill is for a *reconveyance*, and there is a prayer for general relief. The case from 1 Johns. Ch. Ca. cannot apply here, because granting the relief in the decree of the Court below, is inconsistent with the case made. The bill in fact did not seek money ; it does not even allege that the balance is *not* paid ; it seeks a reconveyance. How does it appear to this Court that a separate security was not given for this balance, which may be now outstanding in the hands of the executors?

The rule urged on the other side, as to attornies, is *peculiar* to them as such. But the rule, to have any bearing on this case, should be that an attorney should have no dealings with his client. Now there is no such rule. 15 Ves., 42 ; 6 Ves., 278 ; 1 Ves., 379 ; 2 Ves., 259, 549. But a trustee cannot purchase his trust estate. It is true, b t Cook was no trustee, the legal estate was not in him for any purpose, he had no power or control over it.

Imposition, under the pretence of friendship, is
(511) spoken of. But here, every circumstance of fraud or imposition is expressly negatived by the jury. It would be a strange rule which would compel a man to deal with his *enemies* only, and prevent one friend giving to another a full price for the estate which he wished to sell.

But at all events these complainants are not entitled to the *money :* they sue to obtain the land as *heirs at law and devisees.* The conveyance must stand on the finding of the jury, the *money* belongs to the *executors.*

HALL, Judge, delivered the opinion of the Court:

This bill is brought by the heirs of Daniel Foster to set aside as fradulent, the conveyance made by him of the land in question, to the defendant, and for no other purpose—that is the prayer of the bill. It is true there is a general prayer,

and under that general prayer relief may be given: provided it it be in accordance with, and not contradictory to the particular relief prayed for by the bill—(5 Ves., 495; 3 Ves., 416; 2 Atk.,141)—but that is not the case here. A bill may be framed in the alternative, with a double aspect, and relief may be granted in either case, as circumstances may require—(6 Ves., 52)—but that is not this case; the object of this bill is to have a decree for the land, but not for the money which may be owing for it, provided the sale to the defendant shall not be set aside.

But what is conclusive in this case is, that if there is money due from the defendant, that money is due to the executors of Daniel Foster, and not to his heirs, and the executors are not parties. The decree made in the Court below must be reversed, and the bill dismissed with costs.

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☞ By direction of the Court, the Reporter states, that it is not intended, by the language used in the opinions given in the case (*State* v. *Poll and Lavinia*, page 442 of this volume), to convey the idea, that dying declarations of a deceased person as to *his belief* of the person by whom he was poisoned, are admissible; but simply that declarations otherwise admissible, are not rendered inadmissible from the circumstance of their having been made at a period not *immediately previous* to his death, if the deceased felt assured his disease would prove fatal.

# INDEX.


ABATEMENT:

1. To an indictment for an assault in the Superior Court, the defendant pleaded in abatement, that a prior indictment was still pending against him in the County Court for the same cause: *Held*, that the plea is good; for the Courts hsve concurrent jurisdiction; and to avoid the mischief of having two indictments carried on for the same cause, against the same person, the jurisdiction shall attach in the County Court by the prior finding of the bill, and shall exclude that of the Superior Court, except in its appellate capacity, *unless* it be shewn that the first is carried on by fraud and covin, which may be replied by the State to such a plea. 78.

ACCEPTANCE:

*Vide* EVIDENCE, 2; BILLS OF EXCHANGE, 2.

ACTIONS:

1. Some actions, local in their nature, and some transitory ones, must be brought where the cause of action arises; but with these specified exceptions, no action can be brought in a county in which neither party resides. 422.

ADMINISTRATORS AND EXECUTORS:

1. An administrator, against whom a suit originally commenced against his intestate, is revived by *sci. fa.* may confess judgment on a writ subsequently issued against him as administrator, and give in evidence the record of such judgment, in support of his plea of fully administered, to the suit revived by *sci. fa.* 318.
2. An adminstrator may retain assets to satisfy a debt due to himself on a note of his intestate, indorsed to him after the death of the intestate, and before granting administration. *Id.*
3. The personal representative of a deceased person is not liable to pay for the funeral expenses of the deceased, unless he contracts for them, or subsequently promises to pay for them. There is no *implied* promise to pay for them. 394.
4. Where an individual, of his own mere motion, buried a deceased person, and without giving notice to the administrator of the expenses, sued him, he was not allowed to recover. *Id.*
5. An executor shall not be permitted to become a purchaser at a sale made by him as executor, notwithstanding such sale be public, necessary, fair, for full price, and that those interested were present, and assented to the sale. 497.

AGENT:

1. A, being indebted to the Bank, came to an agreement with it, that he should make a sale on credit, and take bonds *payable to the Bank;* of which, the Bank would take such as might be approved, in payment of his debt. A sale was accordingly made by A, who gave notice of the kind of bonds required; and he took from P, for his purchases, a bond payable to the plaintiffs, which was offered to the Bank, and refused as a *payment*, and returned to A, to proceed on as he might think proper: *Held*, that by this agreement, A became the agent of the Bank, to take and receive the delivery of the bond from P; and that the bond by the delivery to A, was therefore complete: *Held further*, that the subsequent refusal of the Bank to give A credit for it, was not an attempt to undo the delivery and destroy the bond,

and that if such an attempt had been made, it would be ineffectual; for if an obligee once accept a bond, he cannot afterwards disagree to it, so as to make it void. 198.

2. Where a magistrate, who had rendered a judgment on a warrant, afterwards, at the request of an individual, signed the name of that individual in his absence, as security for an appeal: *It was held*, that although the individual might have given authority, in writing, to another to sign his name, yet, that the magistrate was an unfit person for that purpose, as he thereby blended the characters of party and judge. 319.

3. An attorney, acting for his principal, should perform the act *in the name* of the principal. 412.

AMENDMENT:

1. After the term at which a cause was decided, the Supreme Court will not amend the judgment, *nunc pro tunc*, on the motion of one party, without notice to the adverse party; but upon such notice, the amendment will be allowed. 95.

APPEAL:

1. The Supeme Court will not entertain an appeal, but will direct a certificate under the act of 1818, ch. 2, sec. 7; unless the appellant bring up the appeal bond with the record, and file it in due time. 37.

2. The appellant filed the record in due time, but omitted to file the appeal bond with it: *Held*, that on a mere suggestion and motion on behalf of the appellant, a *certiorari* will not be granted; but that on a proper case appearing by affidavit, *certiorari* will be granted. *Ibid.*

3. There cannot be an appeal to the Supreme Court from the judgment of the Superior Court *granting a new trial* for matter of law. 188.

4. Nor from a judgment of *respondeas ouster*, given on demurrer to a plea in abatement. *Ibid.*

5. Nor from a decree *disallowing a plea* to a petition for distribution and ordering the defendant to answer: because these are not *final* judgments, sentences or decrees. *Ibid.*

6. If the appellee file the record in the Supreme Court, he can afterwards obtain a certificate of the failure of the appellant to bring it up; but the Court must look into the record, and affirm or reverse the judgment. 231.

7. There is no method by which an indictment can be removed from the County Court to the Superior Court for trial, but by appeal after final decision. 78.

*Vide* NEW TRIAL, 6.

ASSETS:

1. Where, on the division of an intestate's slaves among his children, an allotment is made to A greater than that to B, another child, and to equalize the division, A is directed out of his share of the property, to pay a certain sum to B, this gives B a lien on the slaves for that amount; and if A's administrator sell the slaves allotted to A before such payment is made to B, the balance only of the purchase-money will be assets in the hands of the administrator, after the sum directed is paid to B. 394.

*Vide* ADMINISTRATORS AND EXECUTORS, 2.

ASSUMPSIT:

1. A declaration in assumpsit, that defendant promised to pay the

plaintiff for a certain house, what "A, B and C should *say it was worth*," is supported by giving in evidence a written agreement, that the defendant would pay what "A, B and C should *say*." 37.

ATTORNEY:
*Vide* AGENT, 3.

AWARD:
1. An award ought not to be set aside, unless it *certainly* appears to be against law, and that in a case where the arbitrators meant to decide according to law. 378.

BAIL:
*Vide* EXECUTION, 1.

BANK OF NEWBERN:
1. *It seems* that the Bank of Newbern may take a bond payable directly to itself for a debt due to itself. 198.

BARGAIN AND SALE:
1. A bargain and sale is good, although the deed does not express that the consideration money *has been paid*. 64.

BARON AND FEME:
1. Husband and wife cannot join in detinue for a chattel, if the husband had actual or constructive possession after marriage: For by the marriage and such possession, the whole vests exclusively in the husband. 67.
2. The wife of the testator may be the person to whose safe-keeping his will, all in his own hand-writing, is entrusted, according to the acts of the last session of 1784, for in this there is nothing incompatible with that union of person and interest which exists in law between them. 384.

BILLS OF EXCHANGE:
1. The drawer of a bill of exchange is entitled to notice of its dishonour, though the drawee be not indebted to him either when the bill was drawn or fell due, provided the drawer had reasonable ground to believe that it would be honoured; and a written authority from the drawee to the drawer, for the latter to draw, is a sufficient ground. 194.
2. If a bill be payable *after sight*, it must be presented within reasonable time for *acceptance*, and immediate notice of non-acceptance given to the drawer: It is not sufficient to give notice of the non-acceptance and non-payment together, after the day of payment has passed. And if in such case, the drawer be discharged by the *laches* of the holder from his liability on the bill itself, he will not be liable on a count for money had and received. *Ibid.*

BOND:
1. The condition of a bond will be so construed, by rejecting insensible words, as to fulfil the intent of the parties. 20.
2. If an obligee once accept a bond, he cannot afterwards disagree to it, so as to make it void. 198. *Vide* INJUNCTION, 1, 2, 3.

BOUNDARY:
1. Under the act of 1791, ch. 15, it is sufficient to shew, that, by common reputation, a tract of land has certain known and visible lines and boundaries, although those lines and boundaries belong to adjacent tracts, and were not made for the land in dispute, nor, in any deed thereof, are recognised as the lines of

such tract: For reputation and hearsay are, of themselves, evidence of boundary. 45.

BREACH OF THE PEACE:

1. A man shall not recover a recompense for an injury received by his own consent, provided the act from which the injury is received be lawful: but if two fight by consent, and one is beaten, he may recover damages for the injury, because fighting is an unlawful act. 420.

CAVEAT:

*Vide* LAND, 1.

CERTIFICATE OF THE CLERK OF A CORT OF RECORD, AS TO AN INSTRUMENT PROVEN IN HIS COURT:

1. When the clerk of a Court of Record certifies that an instrument has been *duly proved* in that Court, it is implied, that every thing required by law, has been proved, upon the maxim, *res judicata pro veritate accipitur.* 48.

2. But where he also states *how* it is proved, and omits a material circumstance required by the law, the certificate of *due proof* is disregarded, because, by the certificate itself, it appears it was not duly proved. Held, therefore, that where a clerk of a County Court certified that a bill of sale for a slave had been "duly proved by the oath of D. H. who proved the hand-writing of B. H. the subscribing witness, and of J. H. the maker of it," the bill of sale is not evidence, for the want of proof of the death or removal of B. H. *Id.*

CERTIORARI:

*Vide* APPEAL, 2.

CHALLENGE:

*Vide* INDICTMENT, 8, 9.

CLERGY:

1. If a statute take away clergy from any *offence*, and another statute, either prior or subsequent, create that offence by its known, legal, and technical name, all the qualities of its name will attach to it: hence it will stand ousted of clergy. 24.

2. The statute 23, Hen. 8, c. 1, ousted *murder* of clergy. Our act of 1817, c. 18, gives to a slave the character of a human being, and places him within the peace of the State, so far as regards his life. Hence it is held, that one, convicted of wilfully killing a slave, with malice prepense, is guilty of murder, and not entitled to the benefit of clergy. *Id.*

COLOUR OF TITLE:

1. It *seems* that the return of the Sheriff upon a *fi. fa.* is a colourable title under the act of '91, though no deed be made by the Sheriff. 45.

CONDITION PRECEDENT:

*Vide* DEVISE, 4.

CONSTABLE:

*Vide* EXECUTION, 3, 4; LEVY, 1.

CONSTITUTIONALITY OF LAWS:

1. When a cause was removed to this Court at a period when the Court, upon motions for new trials, considered matters of law only, and during the pendency of such suit, the Legislature declared that this Court *does* and *shall* possess the power to grant

new trials upon matters of fact as well as law, the Court may consider the case on matters of fact; for such law is not unconstitutional. 384.

2. The power of limited taxation for county purposes, is necessarily confided to the several County Courts; and its exercise is no invasion of the Bill of Rights. 408.

3. The act of Assembly, increasing the jurisdiction of a justice of the peace to $100, is not inconsistent or incompatible with the Constitution of the State. 482.

CORPORATION:

1. The State Bank of North Carolina is a mere private corporation. 36.

2. *Semble*, the residence of a corporation aggregate, is not to be considered co-extensive with the limits of the State. 422.

*Vide* MANDAMUS, 1; EVIDENCE, 3.

COSTS:

*Vide* EQUITY, 2.

COUNTERFEIT BANK NOTES:

*Vide* HANDWRITING, 3.

COVENANT:

1. A covenant of general warranty is subject to the same construction that a covenant for quiet enjoyment is; and where the *habendum* in a deed is to a man and his heirs forever, he may recover for an eviction, on such general warranty, though the clause of warranty should not mention to whose benefit it ensures; for it shall be intended for the benefit of the person to whom the conveyance was made. 410.

DAMAGES:

*Vide* VERDICT, 2.

DEBTOR—REMOVAL OF:

*Vide* EVIDENCE, 6.

DECLARATION:

*Vide* ASSUMPSIT, 1; PLEAS AND PLEADING, 2, 3.

DEED:

1. Any alteration of a deed or writing, if made by the party claiming under it, avoids it—whether the alteration be in a material and obligatory part, or in an immaterial or useless part—provided it be done by design. 222.

2. When a deed for land contains an acknowledgement of the bargainor of the receipt of the consideration, and a clause exonerating the bargainee therefrom, it amounts to a release, and is a bar to an action for the purchase money. 64.

3. In assumpsit for such purchase money, no parol evidence can be received to show that it is unpaid; because it is contradictory to the deed. *Ib.*

*Vide* AGENT, 1.

DESCENT:

1. An estate descends to A from his *mother*, and from him descends to E., his niece of the whole blood—E. shall hold the estate to the exclusion of M. who is sister of the half blood to A. on the paternal side. 423.

# INDEX.


DETINUE:

*Vide* BARON AND FEME, 1.

DEVISE:

1. A. devises lands and slaves and other personal property to M. L. D., but if she "*dies without having heirs*, then, and in that case the property bequeathed to her shall be divided into four equal parts between his brothers J., H. and S. and B.'s children:" *Held* that the limitation over is too remote, and that the whole estate vests absolutely in M. L. D. 163.

2. Devise as follows: "I lend to my wife the plantation whereon I now live, and *after her decease*, I give and bequeath the said land unto my child that my wife is now pregnant with, if a boy, and if it should be a girl, I give the said land to my son H. *upon his paying* unto the said child, if a girl, £100." *Held*, the legacy of £100 is not payable until the death of the testator's widow. 241.

3. Devise to A. and if he dies without any lawful begotten heir of his body, then to his brothers and sisters. *Held* that the devise to A. is of an estate-tail, which, by the act of 1784 is converted into a fee-simple, and the ulterior limitation is therefore void. 247.

4. A. by his will devised to his son W. certain lands, reserving to his wife a life estate in part thereof, and declared it to be his will, in case the child with which his wife was then pregnant should be a male, that after her death, the portion in which she had a life estate should descend to such child; and in the event of the death of his son W. or the death of the child with which his wife was pregnant, if a male, that the survivor should have the whole, if either died without lawful issue: if both died without issue, then that J. S , a nephew, should have a portion of the land. The wife was delivered of a daughter, and it was held that J. S. took nothing, for a precedent estate becomes a precedent condition or otherwise to an ulterior limitation, according to the intent, and as no son was born, the contingency upon which the testator designed his nephew to take, never happened. The language of the will made the birth of a son, a condition precedent, and there was no evidence of intent to dispense with the performance of the condition. 285.

DISCOVERY:

1. R. being a creditor of D. by bond, files his bill against D. and M. charging that D. had fraudulently conveyed property to M. sufficient to pay his debt, and praying a discovery, account and satisfaction. *Bill dismissed* upon hearing, because R. had not reduced his debt to a judgment, and actually issued execution. 85.

EQUITY:

1. I. made a deed to S. for land, which was destroyed before registration, by a combination of I. and S. to defraud a creditor of S; and afterwards, but before the act of 1812, ch. 4, the land was sold under an execution against S, who was present at the sale, and declared the land was his, and urged P. to buy it, who accordingly did purchase it: *Quere*—Did the legal title of the land pass by the sheriff's sale? *Held*, that it was unnecessary to decide that here; because P. had no means of shewing it at law, as the deed was destroyed, and that gave him the right to resort to Equity: *Held also*, that he might do so after an ineffectual attempt to defend himself at law against I: *Held also*,

that if S. was only the equltable owner, his conduct at the sale would constitute P. his assignee in Equity, and authorize him to call for the legal title. 87.

2. Infants, who prosecute an unjust claim at law, and thus compel the Defendant there to come into Equity for an injunction and relief, and who here again set up an inequitable defence, *shall pay costs. Ibid.*

3. Though a bill *deficient in matter* cannot be aided hy the Defendant's answer, or by proofs in the cause, yet when sufficient matter is stated, but *insufficiently verified*, the want of sufficient verification may be supplied by proofs or admissions. 359.

4. A bill in Equity may be framed in the alternative with a double aspect, and relief may be granted in either case, as circumstances may require. And relief may be given under the general prayer in a bill, provided it be in accordance with, and not contradictory to the particular relief prayed for. 509.

JURISDICTION OF, AS TO CHARITIES:

1. Moses Griffin made his will containing the following devises and bequests—"I appoint E. G, W. G, &c., trustees of my estate, and executors of my will—I give the remainder of my estate" (after certain legacies and payment of his debts) "to my said trustees and executors, in trust, to be managed by them to the best advantage for the purposes hereinafter mentioned, I desire that my landed property shall not be sold, but rented out to the best advantage. I desire that my trustees and executors out of the issues and profits of my estate, real and personal, shall purchase two acres of ground in Newbern, and as soon as the funds arising from the profits of my estate be deemed by them sufficient to make a commencement, that a brick house shall be erected on said land, suitable for a school-room, and finished in a plain manner, fit for the accommodation of indigent scholars, and to be called 'Griffin's Free School.' And it is my desire, that as soon as the house is finished, and the funds arising from the profits of my estate will admit, a proper schoolmaster shall be employed to teach and educate therein, as many orphan children, or the children of poor and indigent parents, who, in the judgment of my trustees, are best entitled to the donation, as the funds are found equal to—and it is my wish to clothe and maintain the indigent scholars as well as to school them: and when they shall arrive at the age of fourteen, it is my desire that my executors bind them out to suitable occupations. And to prevent misconception, my meaning is, that the amount of my estate, real and personal, be considered as a principal sum, and remain undiminished forever; and that the issues and profits only shall be appropriated to the support of the said free school. And it is my desire, that all interest arising from money be put out at interest again, and be deemed principal, and continue at interest until, by my executors it shall be deemed sufficient to put the institution in operation." The heirs-at-law, and next of kin filed this bill against the executors and trustees, praying that the trusts might be declared void, and that the Defendants might be declared trustees for them, and for an account. *Held*, by a majority of the Court, that the stat. of the 43d of Eliz., c. 4, is in force in this State, and that the Court of Equity, by virtue of it, has jurisdiction of all charities. *Held also*, that independent of that statute, and though the jurisdiction of charities in England belongs to the Court of Chancery, not as a Court of Equity, but as administering the prerogative of the Crown, the Court of Equity of this State has

the like jurisdiction: for, upon the revolution the political right and duties of the King devolved upon the people in their sovereign capacity; and they by their representatives, have placed this power in the Courts of Equity, by the acts of Assembly of 1778, c. 5, and 1782, c. 11. But if this were not so: *it is further held*, that as there are trustees and a trust for a definite charity, and a specific object pointed out, the Court would, as a mere matter of trust, take cognizance in this case, by virtue of its ordinary jurisdiction as a Court of Equity. *Held also*, that, if the Court of Equity had no jurisdiction of charities, as such, nor of a trust relating to them, and could not, upon a bill by the trustees or others, establish the charity by decree, yet, inasmuch as the estate of the trustees is good at law, and the condition or trust is certain and not unlawful, no trust results in this case, for the heir or next of kin; and therefore the bill is dismissed. *Held also*, that this will doth not create a perpetuity: for the trustees have the power of alienation—and though notice to the purchaser might affect him in Equity, yet that, being a circumstance collateral to the power of selling, will not affect the question of perpetuity; and the clauses in the bill of rights and constitution, were designed only to prevent dangerous accumulations of individual wealth, and referred to estates tail alone: the establishment of a *permanent fund for charitable uses* does not come within the mischief, and is not prohibited by either of those clauses, nor by the Common Law. 96.

EQUITY—JURISDICTION OF:

1. A, by his will executed in North Carolina, appointed four executors, two of whom resided in Tennessee, and devised to his nephews and nieces, certain lands in Tennessee, directing his executors, previous to a division of these lands among the devisees, to raise therefrom such sum as would be sufficient to pay all his debts. The rest of his property he directed the executors to sell, and the money arising therefrom he bequeathed to Complainant. On a bill filed against the executors and devisees, shewing that the acting executor in North Carolina had applied a portion of Complainant's residue in payment of testator's debts, and praying that the lands charged might be sold, and she reimbursed; it was held, that as the lands were without the limits of North Carolina, no decree could be made by this Court against the acting executor here, to sell those lands. 365.

*Vide Ne Exeat*, 1.

ERROR:

1. It is not error for husband and wife to appear by *their* attorney; for although they are but one person in law, the husband may make an attorney who shall appear both for him and her. 231.
2. The refusal of an inferior Court to allow pleadings to be amended, or to continue a cause, or any exercise of a mere power of discretion, *held* not to be an error for which the *judgment* will be reversed on appeal or writ of error.
3. Nor is it an error to refuse a new trial, which is moved for on the ground that the verdict is *against evidence*. *Ibid.*

ESCAPE:

*Vide* SHERIFF, 2.

EVIDENCE:

1. The declarations of a party cannot be offerred in evidence on his behalf, in any case, unless they accompany acts, and be *pars res gestæ*, and are offered as such. They are not admissible even to

shew the insanity of the prisoner. *Held*, therefore, where a prisoner had committed homicide at 10 o'clock at night of one day, that evidence of what *he said the next morning* could not be received to prove his derangement. 24.

2. Acceptance and payment of a check in *prima facie* evidence, that the acceptor had the necessary funds of the drawer; and it is incumbent on the former to shew that he had not. 36.
3. The books of accounts kept by the bank, of the dealings between it and a customer, are not evidence for the bank in a suit between it and the customer. *Ibid.*
4. By the true construction of the act of 1806, the certificate of the Adjutant General is evidence only in such cases of delinquency of the officers of militia in making returns, as consist in not making returns to himself. *Held, therefore*, that he cannot certify that a *Colonel of Cavalry* did not make his return to the Major General. 207.
5. It is competent for one charged with the murder of a slave to give in evidence that the deceased was turbulent; that he was insolent and impudent to white persons. 210.
6. The certificate of the justice of the peace required by the "act to punish persons for removing debtors out of one county to another," is intended solely for the benefit of the person who removes the debtor; it is only a *mode of proof* that the debtor has duly advertised:—it may therefore be obtained at any time, either before or after the removal: and it may be dispensed with altogether, if the party can make the same proof by other testimony. 226.
7. Evidence is admissible of the declarations of a testator made *at any time* subsequent to the execution of the will, which goes to shew that the testator believed the contents of the will to be different from what they really are; or declarations by testator of *any other* circumetances which shew that it is not his will, are admissible. 248.
8. If two individuals indorse a note in virtue of a mutual understanding with each other, to lend their names for the accommodation of the maker, evidence may be left to a jury of such mutual understanding or agreement. 313.
9. The declarations of a deceased person, that he was poisoned by certain individuals, not made immediately previous to his death, but at a time when he despaired of his recovery, and felt assured his disease would prove fatal, are admissible as dying declarations. 442.
10. When a common design is proven, the *act* of one, in furtherance of that design, is evidence agninst his associates; but the *declarations* of one of the parties can be received only against himself. *Ibid.*

*Vide* INQUISITION, 4, 5—CERTIFICATE OF CLERK, 2—DEED, 3—ADMINISTRATORS AND EXECUTORS, 1—FRAUD, 1—WITNESS, 2—HIGHWAY, 1—SLAVES, 2—ASSUMPSIT, 1.

EXECUTION:

1. When a defendant in execution once obtains his liberty by the assent of the plaintiff, he cannot be retaken; and if he be one of several defendants in the same suit, the plaintiff can neither retake him nor take any of the other defendants. *And hence it is held*, that if there be judgment against two, and the plaintiff take one in execution, and discharge him, the bail of *both* is exonerated. 51.

2. When a Sheriff had levied an execution on certain lands, and a *ven. ex.*, together with a special writ of *fi. fa.* issued afterwards on the same judgment, and was levied by the Sheriff on goods which, seven days prior to that time, he had seized by virtue of a *fi. fa.* issuing on a younger judgment, the Court directed the proceeds of the sale to be paid in satisfaction of the *fi. fa.* which first came to hand and was first levied. 325.

3. When a magistrate issues an execution in the first instance against goods and chattels, lands and tenements, such execution is not in the form required by the act of 1794, but if the constable return, that in default of chattels he has levied on land, it corrects the irregularity, and the informality is also cured by the 16th section of the act of 1794. 329.

4. It is not necessary that a *ven. ex.* issuing on a Constable's levy, should be made returnable to any given time. *Ibid.*

5. Where an execution is levied upon property, and the plaintiff in such execution, to favour the defendant, forbears to sell, and holds on under the lien thereby created, the property may be sold under executions of a younger date. 483.

EXECUTORS:

*Vide* ADMINISTRATORS AND EXECUTORS.

FRAUD:

1. Whether a deed be *fraudulent* or *bona fide*, is a question of *fact*, and possession, or the want of possession, is but *evidence* tending to establish the question one way or the other. 320, 341.

2. If the plaintiff in a magistrate's judgment knows that the defendant has personal property sufficient to satisfy his execution, and permits the constable to levy on land, and return no personal property to be found, moves on such return and levy for a *ven. ex.*, causes a sale, and becomes himself the purchaser of the land, it is not a fraud *in law*, but should be left to a jury to draw a conclusion from. 329.

3. Whether a conveyance is made with an intent to defraud creditors or not, is a question of *fact*, and not of *law*. 341.

4. When A. makes a fraudulent conveyance of his property *prior* to the recovery of a judgment against him by B. for a tort, B., although not a creditor at the time the conveyance was made, is entitled after judgment to a *scire facias*, under the act of 1806. 474.

GIFT:

1. When a *gift* of a chattel is found or stated in a case, a delivery is presumed; because without it, it is not a gift. 67.

2. And such possession of the donee will be presumed to continue, unless the contrary be found or stated—especially if it appear, that another claimed and exercised ownership *from* a particular subsequent period. *Ibid.*

GRANT:

An instrument, purporting to be a grant for land, which was under the great seal of the State, was signed by the Governor and recorded in the Secretary's office, but was *not countersigned by the Secretary*, will not pass the land, and is void. 221.

GUARDIAN:

1. The proper construction of the act of 1795, ch. 15, is, that it is incumbent on an infant, after arriving at full age, not only to "call on his guardian for a full settlement," but to have a *final*

adjustment of all accounts, matters, and things, with his guardian, within three years; and either sue for any balance which may be due him, or notify the securities to the guardian bond of the situation in which he stands to the guardian. Without such conduct on the part of the infant, the securities are discharged. 271.

2. The County Courts have the same powers with a Court of Equity to rectify mistakes in the settlement of a guardian's account, provided the mistakes be clearly shewn. 493.

HALF BLOOD:
*Vide* DESCENT, 1.

HANDWRITING:
1. A witness, who has never seen a person write, nor received letters from him, and who has no knowledge of his handwriting but that derived from having received bank notes in the course of business, which purported to be signed by the person as President of the Bank, and which were reported to be genuine, is incompetent to prove his handwriting, or to prove that a bank note, purporting to be signed by him, is counterfeit: at least, unless the ordinary occupation of the witness is such, as to render it probable that he has received and passed large sums, so as to become a skilful judge; and unless it appear that he has actually passed them so long ago, as to allow time for the return of them, if spurious. 6.
2. The mode of proving handwriting, are by the evidence of those, 1st, Who have seen the person write, which is most certain; 2d, Who, in the course of correspondence, have received pertinent answers, or other letters, of such a nature as renders it highly probable that they were written by the person; 3d, Who have inspected, and become acquainted with ancient authentic documents, which bear the signature of the person. *Ib.*
3. It seems that a witness, having no knowledge of the handwriting of the person but that derived from the signatures to bank notes, if he be a banker, and in that character has habitually, for several years, received and paid away large sums in such notes which he believed to be genuine, and were so reputed, is competent to prove that a note, purporting to be a bank note, and to be signed by the same person, was not signed by him, and is counterfeit. *Ib.*
4. The handwriting of a magistrate to his official acts, need not be proved by himself, though within the process of the Court; but may be proved by any person acquainted with it. 190.
5. The subscribing witness to a bond must be produced to prove it, upon the plea of *non est factum;* but the parties are not confined to his testimony; and the obligee is at liberty to give evidence also of the handwriting of the obligor, or of any other fact tending to establish that it is his bond—as his acknowledgement, or the like. 49.

HIGHWAY:
1. By an act of the Legislature, passed in 1810, three commissioners were appointed, whose duty it was made to examine a certain turnpike road, and make report of its state and condition at each County Court; and if, from their report, it appeared that the road was not kept in good order, a prosecution was to be instituted against the proprietors. By an act of 1819, the power of appointing the commissioners was vested in the County Court, their number reduced to two; and it was made part of their duty

to give information to the Grand Jury of the Superior Court when the road was out of repair. On an indictment against the proprietors, the commissioners under the act of 1819, who reported the road to the Grand Jury as being out of repair, may be permitted to prove the state of the road, notwithstanding the act of 1810 declares, that the proprietors shall not be indicted, except upon the view and report of the commissioners appointed by the act of 1810; for by the appointment of those under the act of 1819, those under the former act ceased to exist; and yet the proprietors must be liable, as to the convenience of the public and their interest, in a highway, cannot be surrendered by implication. 346.

HOMICIDE:

1. The whole design of the act of 1817, "to punish the offence of killing a slave," was to make the homicide of a slave extenuated by legal provocation, *manslaughter*, and to punish it as such: it does not go further and determine the degrees of the homicide, but leaves them to be ascertained by the Common Law. 210.
2. At Common Law, and between *white persons*, a *slight blow* will not *excuse* a homicide—for that must be on mere necessity; but it exists in the very nature of slavery that the relation between a white and a slave is different from that between free persons; and therefore many acts will extenuate the homicide of a slave, which would not constitute a legal provocation if done by a white person. *Ib.*
3. *Words* will not *extenuate* a homicide to manslaughter; but it is not correct to say "that a slight blow, not threatening death or great bodily harm, will not extenuate, if the weapon used by the slayer be not a deadly one;" because that authorises the inference, that a blow to constitute a legal provocation *must* threaten death. *Ib.*
4. If he on whom an assault is made with violence, or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in heat of blood and under that provocation, it is but manslaughter. *Ib.*
5. The general rule is, "*that words are not, but blows are a sufficient provocation to lessen the crime of homicide to manslaughter;*" to this there are a few cases forming exceptions, but they depend on very particular circumstances. *Ib.*
6. Where, upon words of reproach on both sides, between Y. and B., the latter approached the former and struck him a violent blow with his fist, which staggered him, and the company separated them, and were taking B. away, when Y. within one minute, advanced upon B., who extended his arm to take hold of him, and Y. immediately stabbed him with a knife, which he had not shewn before: *Held*, that if death had ensued, it would not be *murder*, but *manslaughter*, notwithstanding the separation for a minute and the weapon; for the wrath of the accused kindled in the highest degree by the blow, would not reasonably subside in that period, and in such case the instrument makes no difference. 78.
7. Necessity distinguishes between manslaughter and excusable homicide, and not between the former and murder. Its absence is common to both murder and manslaughter. *Ib.*
8. A killing on sudden quarrel, to avoid great bodily harm, places a man under circumstances amounting to legal provocation, and though such circumstances cannot justify or excuse the act, yet

on account of human frailty, the homicide is extenuated and is but manslaughter. 349.

9. A well grounded belief that a known felony is about to be committed, will extenuate a homicide committed in *prevention* of the felony, but not a homicide committed in pursuit by an individual of his own accord. 457.

INDICTMENT:

1. The property in a slave is not the essence of offence of the murder of him, and it is immaterial whether it be laid in the indictment or not: Hence, it need not be proved upon the trial as laid. *Quere:* If the property be proved different from that laid? 24.
2. When a bill of indictment is found by the same Grand Jury which made the presentment, upon the testimony of some of their own body not sworn in Court as witnesses, such proceeding is in opposition to the act of 1797, ch. 2, sec. 3, and the bill must be quashed. 352.
3. A caption of an indictment forms no part of the indictment, and therefore it is not a ground for arresting judgment, that the indictment does not shew in its caption that it was taken before a Court in North Carolina. While the indictment stood on the records of the Court below, it appeared to be an indictment of that Court, and when sent to this Court, the caption of the record of which it is a part, officially certified, renders it sufficiently certain. 354.
4. To support an indictment for taking away property, it must be a violent taking from the *actual* possession of the owner at the time. 449.
5. An individual who acts as an ordinary keeper, without taking out license and giving bond, but who has a license to retail spirituous liquors, may be indicted on the act of 1798, ch. 501, for exacting more than the rates established by the Courts of his county, and he is estopped from denying that he is a tavern-keeper. 451.
6. All that is necessarry as regards laying the time in a bill of indictment, is, that the offence shall appear to have been committed before the finding of the bill, except in those cases where the time forms part of the offence. 460.
7. In general, the time is not traversable, and if it be laid after a *scilicet*, and be repugnant to the time laid in a former part of the indictment, the *scilicet* will be rejected as superfluous. *Ibid.*
8. In an indictment for sending a challenge, it is not necessary to set out a copy of the challenge; and if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter no ways altering the sense, it seems such variance is not fatal, and after verdict, it is cured by the act of 1811. 487.
9. A challenge to fight a duel *out* of the State is indictable, for its tendency is to rouse the passions, and produce an immediate breach of the peace. *Ibid.*

INDORSEMENT:

*Vide* EVIDENCE, 8; ADMINISTRATORS AND EXECUTORS, 2.

INFANTS AND INFANCY:

*Vide* EQUITY, 2; GUARDIAN, 1.

INJUNCTION:

1. The act of 1800, ch. 9, does not require a bond of any particular *form* to be given for obtaining an injunction. 20.

2. If a bond given upon obtaining an injunction be conditioned, "If the said R. G. (the Complainant,) should dissolve the injunction, and pay the sum recovered at law, and interest," the words, "*should dissolve the injunction, and,*" will be rejected as insensible. *Ibid.*

3. It is no objection to such a bond, that it is taken for double the amount of the recovery at law; nor that it provided in the condition for the payment of interest on the sum recovered, should the injunction be disolved. *Ib.*

INQUISITION.

1. It is most proper, that an inquisition should distinctly find the party to be a *lunatic* or an *idiot*; but it will be sufficient if an equivalent description be used—as, that he is of *insane mind.* 11.

2. An inquisition finding the party "to be incapable of managing his affairs," only, is defective and void. *Ibid.*

3. No person is entitled to a traverse to an inquest of office, in its proper and technical sense, under st. 2 Ed. 6, so as to vacate the office, unless he be interested at the time of finding it. *Ib.*

4. But such inquest, when offered in evidence, is only presumptive proof against persons not parties or privies. *Ibid.*

5. Held, therefore, in debt on bond, given after office found, where an inquisition was pleaded for the defendant, that the plaintiff might, in his replicacation, traverse the truth of it, and upon the trial, give evidence to verify the replication. *Ibid.*

JUDGMENT—PURCHASE OF.

1. Where A. pays to the Sheriff the amount of an execution in his hands, in favour of B. against C, if B. afterwards assign his interest in the judgment to A. such payment shall be deemed a purchase, and not a satisfaction of B's claim. 483.

JUDGMENT FINAL.

*Vide* APPEAL, 3, 4, 5.

JURISDICTION.

*Vide* GUARDIAN, 2—EQUITY, JURISDICTION OF, 1.

JUROR.

*Vide* NEW TRIAL, 2, 3.

JURY.

1. It is the province of the jury to decide, not only on the veracity and credit of the witnesses, but also on *what facts* are proved by their testimony: and it is error in the Court to direct the jury to infer one fact from another. 198.

2. Under the act of 1796, a Judge may say to a jury that a particular fact is *proved*, if the jury believes the witness deposing to such fact. 309.

3. Misconduct on the part of a jury, to impeach their verdict, must be shewn by other testimony than their own. 344.

LAND.

1. D. entered a tract of land in 1777, which T. claimed in virtue of an improvement and occupancy: T. could not caveat the entry, because he would not take the oath of allegiance to the State, and for that reason he assigned his right to M, who was to enter the caveat at the expense of T, and in trust for him: M. caveated, and finally obtained a grant, and T. filed his bill for a conveyance. The bill is dismissed, because the acts of April,

1777, and November, 1777, expressly require the oath to be taken by all persons who enter land, and T. could not, therefore, have made the entry or caveat himself ; and the agreement between him and M. was an evasion of those acts, and a fraud upon the State. 137.

2. W. A. made an entry of land, paid the fees and purchase money, and obtained a warrant of survey, and applied several times to the county surveyor to make the survey ; but he declined doing it, and made W. A. a deputy for that purpose just before the entry would lapse. W. A. proceeded to make the survey as deputy, returned it to the office, and obtained a grant. F. W. had entered the same land, with notice of W. A's entry, and being also a deputy surveyor, fraudulently made out a plat of survey from W. A's field book, which he returned into the office, and obtained a grant prior to that of W. A. who filed a bill for relief, and a conveyance of the legal title from F. W. He did not state that either he or the chain-carrier had been sworn. —*Held*, that W. A. was not entitled to relief ; and his bill was dismissed, because the survey had been made by himself, and not on oath. 140.

3. If a navigable lake recede gradually and insensibly, the derelict land belongs to the riparious proprietor ; but if the recession be sudden and sensible, such land belongs to the State, and it seems, is the subject of entry under the act of 1777, c. 1. 56.

4. Where a part of a tract of land is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not included in both deeds, the possession of the part included in both, is in him whose deed or patent is the elder ; but if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is his, and the other will be barred thereby. 467.

*Vide* GRANT, 1.

LEVY.

1. Where a levy was made by a constable under a magistrate's execution, on the defendant's land, and returned on *the same day* to the County Court, which commenced its session on that day; it was held that this was a return "to the *next* Court" within the meaning of the act of 1794, sec. 19. 329.

2. If a sheriff has levied an execution against chattels in due time, he may complete the levy by a sale after the return day, though he cannot levy after that day. 329.

*Vide* EXECUTION, 3.

LIBEL.

1. Though, from the publication of a libel unexplained, malice will be *prima facie* implied, yet, as the act may be innocent, and in some cases justifiable, the circumstances under which it was done, should be left to a jury. 472.

*Vide* PLEADING, 3.

LIMITATIONS.

1. A debt barred by the statute of limitations, is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, *after paying my debts*, they, &c." 304.

*Vide* PLEAS & PLEADING, 1.

LUNATIC.

*Vide* INQUISITION, 1, 2.

# INDEX.


MANDAMUS.

1. When a corporate body strikes off the name of one of its members, without giving him previous notice of their intention so to do, and affording him an opportunity of being heard in his defence, a mandamus to restore will be granted. 274.

MANSLAUGHTER.

*Vide* HOMICIDE, 1, 4, 7.

MILITIA.

*Vide* EVIDENCE, 4.

MESNE PROFITS.

1. Mesne profits during the enjoyment under a defective title, cannot be set-off against the claim of interest upon the purchase money, because the possessor is liable to the rightful owner for them. But where it appears that the possessor has enjoyed the lands, and cannot be called to account for the mesne profits, the reason of the rule ceases, and it does not apply. 412.

MONEY.

*Vide* RECEIPT, 1, 2.

MORTGAGE.

1. A mortgage of a slave was made in 1789, to secure a debt due in March, 1793, and the mortagee took possession at the date of the deed, and continued it until 1815 without any account or acknowledgment. *Held*, that the mortgagor could not redeem. Such a lapse of time creates the presumption, that that the right of redemption has been abandoned. 17.

MURDER.

*Vide* HOMICIDE, 4.

NE EXEAT.

1. The rule that Courts of Equity interfere by *ne exeat*, only in case of equitable demands, applies where, *money*, not *property*, is the subject of controversy. 359.

NEW TRIAL.

1. Although sufficient legal evidence be before the jury to justify the verdict, yet if improper testimony be admitted, after objection, a new trial will be ordered, because it cannot be known on which the jury relied. 6.

2. A person called as a juror in a capital case, said on oath, that he had not formed nor expressed an opinion respecting the guilt or innocence of the prisoner; and after the verdict it was proved that he had declared a few minutes before, to a third person, "that he could not serve, because he had made up his opinion," which was unknown to the prisoner at the time he accepted the juror. *Held*, that there shall not be a new trial—1st, because such declaration was not on oath; and 2dly, because it is contradicted by the juror on oath. 24.

3. If the insanity of a juror be alleged as a reason for a new trial, being a disqualification so easily perceptible from its nature, it must be proved by clear and full evidence. *Ibid.*

4. When a Superior Court *grants a new trial* for matter of law, there cannot be an appeal to the Supreme Court from the judgment of the Superior Court. 188.

5. A new trial will be granted for misdirection, although the record does not show that the verdict ought to have been otherwise, if the Court had directed otherwise. 45.

6. It is not a ground for this Court to order a new trial that the

Court below *has not stated the case* on the record; for the appeal is not necessarily from the opinion of the Court on points arising out of the facts at the trial, but may be for error in the pleadings. 231.

7. When an objection is taken on trial to a bill of sale, because registered in the wrong county, and on a former trial between the same parties, the bill of sale was read without objection, it is a surprise on the party introducing the evidence, and a new trial will be granted to promote the justice of the case, upon payment by the party seeking it, of the costs of this and the Superiorr Court. 309.

8. When the statement of the facts of a case before this Court is such as to admit of two views of them, and it be doubtful which is the correct one, and according to one of them the law has not been administered in the Court below, it is a ground for a new trial. 315.

9. After an acquittal of a defendant on a State prosecution a new trial cannot be granted. 462.

NOTICE:
*Vide* BILLS OF EXCHANGE, 1, 2.

ORDINARY KEEPER:
*Vide* INDICTMENT, 5.

PATROLS:
1. Some degree of discretion in the punishment of slaves, is necessarily allowed patrols. 418.

2. If, in the exercise of this discretion, they inflict punishment, they are not liable in an action to the master, unless their conduct clearly demonstrates malice against the owner.

PENAL STATUTE:
1. In a penal statute, "*or*" will never be construed "*and*," so as to make it more penal: *Held therefore*, that under the act of 1816, c. 20, corporal punishment and fine, cannot both be imposed on a person convicted of a felony, within clergy: *Held also*, that the infamous punishment of whipping, therein provided, ought to be restricted to infamous crimes: so that the true construction of the statute is, to refer the fine to manslaughter, and the whipping to larceny and the like. 53.

*Vide* PLEAS AND PLEADING, 2.

PLEAS AND PLEADING:
1. A sold to B a tract of land on the 6th November, 1811, and took from him in payment thereof, a bond given by H to C, of which B was then the holder, without indorsement to or from B under this special agreement, that A should sue H in a *short time*, and if H failed, B would then pay it. A brought suit against H in September, 1812, tried it in October, 1815, and failed to recover; and in October, 1816, he sued B, and declared first, for the price of the land sold; and secondly, upon the special agreement: *Held*, upon the pleas of the statute of limitations and *non assumpsit*, that A could not recover upon either count; for the statute of limitations began to run, from the making of the contract, as laid in the first count; and the laches of the plaintiff, in not bringing suit against H for ten months, discharged B upon the special agreement set forth in the second. 41.

2. In actions on penal statutes, it is necessary, in the declaration, to name the statute, or recite iis provisions, or refer to it in some

manner, as by the general terms, "contrary to the statute in such case made and provided," so as to give the party notice of the law, with the violation of which he is charged: *Held, therefore*, that a warrant against H to answer S "in a plea of debt of £5, for obstructing and turning the public road, leading, etc., from, etc., to, etc., being one month," is insufficient: *Held further*, that this is a defect in *substance*, and is not cured by verdict, nor to be overlooked in proceedings before a justice of the peace, in which mere matters of form are not regarded. 192.

3. In an action against husband and wife for a libel, the declaration had two counts: in the first it was charged that the defendants combined and contrived to cause it to be believed, that the plaintiff was a "sot and common drunkard." In the second, it is charged that the defendants "further contriving and intending *as aforesaid*, composed, etc., the libel, etc., with inuendos," applying the words to the plaintiff: upon the plea of not guilty, a verdict was found for the plaintiff upon the *second* count only. *It was held*, that the words "*further contriving and intending as aforesaid*," refer to the allegation contained in the introductory part of the first count, and constitute a *sufficient averment* in the second count "*that the defendants contrived, and intended to cause it to be believed, that the plaintiff was a sot and common drunkard*," without repeating those words in the second count. 231.

4. Wherever injury is done to goods in the actual possession of a servant, carrier, or bailee, if the owner have the immediate right of possession, he may sue for such injury in his own name: therefore, where A loaned a horse to B during the will of A, and the horse is seized by virtue of an execution against B, A may maintain trespass against the officer refusing to deliver him up. 301.

5. A count against an executor, charging him upon his promise as executor, may be joined with a count, upon promises of his testator. 394.

6. Tenants in common may recover on a joint demise. 469.

7. Possession alone is sufficient to maintain trespass against a wrongdoer. 485.

*Vide* BILLS OF EXCHANGE, 2; INDICTMENT, 7.

POSSESSION:

*Vide* FRAUD, 1; LAND, 4.

PRACTICE:

1. If a party to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that Court. 16.

2. When a cause is once ordered to the Supreme Court, that Court acquires jurisdiction, and the Superior Court cannot take any farther step in it. The Supreme Court, therefore, will not regard any subsequent proceedings in the Court below. 41.

*Vide* NEW TRIAL, 4.

PRISONER:

*Vide* SHERIFF, 3.

PROBATE:

*Vide* WILLS, 1; EVIDENCE, 7.

PUBLIC OFFICERS:

1. It is the duty of public officers who are paid for their services, to

furnish blanks to be executed by individuals who have business to transact with them in their official capacities. 427.

REASONABLE TIME:

"*Reasonable time*" means that a party shall do an act as soon as he conveniently can: and it seems the Court is to judge of that. 41.

RECEIPT:

1. A paper writing in these words, "*Received of J. D. his book account in full*," is a receipt *for money*, within the act, of 1801, ch. 6—it being proved, that at the day it bears date, J. D. was indebted to J. L. in a sum of money upon open account. So, likewise, these words, "*Received the above in full*," at the foot of an account. 3.
2. All debts are to be understood as received or paid *in money*, unless explained by other circumstances. *Ibid.*

RECEIVER OF STOLEN GOODS:

1. A receiver of stolen goods under the value of twelve pence, who is tried and found guilty, when the thief has never been prosecuted, but is running at large amenable to process, is not liable to be punished, and no sentence can be pronounced against him. 463.

RECORD:

1. A record is deemed by law authentic beyond all contradiction; and when regularly certified by the proper officer, it is conclusive upon the plea of *nul tiel record*. 71.
2. But where a Clerk made an entry, by order of the Judge of the Court, in the record of a cause the day after term, and at the next succeeding term, a motion was made to strike the same out: *Held*, that such entry is, in fact, no part of the record, and that the Court should order it to be annulled and expunged: *Held, also*, that the affidavits of the party and the Clerk will be heard in support of such motion. *Ibid.*
3. But, *held* by one Judge, that, although such entry is, in fact, no part of the record, yet, if it appear upon the record duly certified by the Clerk, it is conclusive; and no proof can be heard against it, nor can the Court order any alteration in it. As, however, the Clerk wrongfully made it, *he* may expunge it, and restore the record to the truth; and if he will not, but issues process on it, he will act upon it *at his peril*. *Ibid.*
4. Where a suit was referred to arbitrators, who returned their award in vacation, when the *Clerk* entered it on the record as a judgment rendered in Court, such entry was ordered to be expunged, and the whole proceeding was held to be void in law; and this, although the party to be affected by the entry gave a subsequent release of errors, for the consent of parties can never alter the law. 282.
5. Where a record states that a *ven. ex.* was returned on the first day of the term, satisfied by the sale of land, and it appears from the case that the sale was actually made on the second day of the term, it will be presumed that the Clerk made such an entry on the record with reference to the legal fiction, that the sessions consist of but one day. 329.
6. Where, on the return of a constable that he had levied on land, a *ven. ex.* was moved for, and it appears from the record that a writ issued as follows, "ordered by the Court that the lands, &c., (describing them,) levied on by the constable, be sold," though the order of sale and the paper called a *ven. ex.* are blended to-

gether, yet it sufficiently appears from the record that there was such an order. *Ibid.*

RECOVERY:

A. purchases a tract of land and sells it to B. B. is evicted by a better title. As soon as the fact is ascertained by A., he may immediately make compensation to B., and sue his own vendor, without any recovery at law by B. against him. 410.

REGISTRATION:

*Vide* SALE, BILL OF, 1.

REMOVAL OF CAUSES:

1. It is not competent for owners of slaves, or their counsel, to *consent* to the removal of a criminal cause against such slave: it cannot be otherwise removed than on *affidavit*. 442.
2. Where a suit is commenced in the County Court, and removed by *consent* into the Superior Court, such removal is good, provided the suit be one of which the Superior Court may entertain jurisdiction. 493.

RETAILERS:

*Vide* INDICTMENT, 5.

SALE—BILL OF:

Under the act of 1792, a Sheriff's bill of sale for a slave is like the bill of sale of any other person: and when the purchaser takes the actual possession of the slave, the conveyance must be recorded in the county where such purchaser resides. 307.

SEQUESTRATION:

The affidavit on which an order of sequestration is awarded, should state *positively* the existence of the facts on which the application is grounded, or if only matter of belief, the grounds of that belief. 359.

SET-OFF:

*Vide* MESNE PROFITS, 1.

SHERIFF:

1. When a return to an execution against land is signed by a Deputy Sheriff, but the deed to the purchaser is executed by the Sheriff, it is a ratification of the acts of his deputy, and a title thus consummated cannot be impaired by the return on the execution. 329.
2. In debt on Sheriff's bond for escape, it is proper for the jury to consider the damages really sustained by the escape; and they are not bound to give the whole sum due from the original debtor. 425.
3. Where a prisoner, desirous of being admitted to the prison bounds, applies to the Sheriff, and offers to prepare a bond with ample security, and the Sheriff refuses to admit him to the rules, or to take any bond, such conduct on the part of the Sheriff is a waiver of any further act to be done by the prisoner, even supposing the law required him to prepare and tender a bond. 427.

*Vide* PUBLIC OFFICERS, 1.

SLAVES:

1. Under the act of 1784, relative to the transfer of slaves, a transfer by parol is good as between the original parties and volunteers under them, and is void only when creditors and purchasers are concerned. 338.

2. Notwithstanding the act of 1741, a slave tried for a capital crime may be convicted on the testimony of a slave, though uncorroborated by *pregnant circumstances.* 434.

SUBSTANCE:
*Vide* PLEADING, 2.

SURVEY:
*Vide* LAND, 2.

TAXATION:
*Vide* CONSTITUTIONALITY OF LAWS, 2.

TITLE:
*Vide* SHERIFF, 1.

TRAVERSE:
*Vide* INQUISITION, 3, 5.

TRESPASS:
*Vide* PLEAS AND PLEADING, 4, 7.

TRUSTEES;
*Vide* ADMINISTRATORS AND EXECUTORS, 5.

USURY:
A. residing in North Carolina, contracted in New York a debt with B., who lived in that place; afterwards A. paid to the agent of B. in North Carolina, a part of the debt, and credit having been given him for four months for the balance, interest at the New York rate (seven per cent.) was calculated on the balance for four months, and added thereto, and for that sum A. gave his bond. *Held*, that this bond was not contrary to the usury laws of North Carolina. 476.

VERDICT:
1. A verdict, which finds a fact contrary to a legal presumption, is repugnant and void. 45.
2. In a case of trespass to a man's possession, attended with circumstances of aggravation, such as wantonly exposing a crop to the incursions of cattle, this Court will not, on the ground of excessive damages, disturb a verdict giving the highest price at which the crop might have been sold. 315.

*Vide* JURY, 3—PLEAS AND PLEADING, 2.

WARRANTY:
*Vide* COVENANT, 1.

WILL:
1. In a petition to have a probate of a will set aside, and a re-probate in solemn form, all the heirs at law and distributees need not be made parties. It is sufficient, if the petition be brought by one of them, and all the executors, devisees and legatees, claiming under the will be made defendants. 58.
2. Where a will is found in the drawer of a bureau, commonly kept locked, in which the testator's wife was in the habit of keeping her money, jewels, &c., and which the testator pointed out as the place of depositing his will, it is found among his valuable papers or effects, within the meaning of the act. 384.
3. The signature of subscribing witnesses is no part of a will; and if there be but one to a will of lands, it may be proved to be all in the testator's handwriting, and to have been found among his valuable papers or effects. *Ibid.*

*Vide* EVIDENCE, 7—BARON AND FEME, 2.

WITNESS:

1. If a witness is proved to be a minister of the Gospel, that fact may with propriety be mentioned to a jury, but it does not *necessarily* entitle his testimony to more weight than that of another man. 309.

2. The testimony of a witness, taken down in writing by a magistrate, cannot, on the trial of the same matter in Court, be used as evidence-in-chief, particularly when the witness is present; but may be used to shew contradictory statements made by him. 344.

*Vide* HANDWRITING, 1, 2, 3, 5—WILLS, 3.

WOODS:

The acts of 1777, ch. 25, and 1782, ch. 29, do not apply to cases of burning woods from necessity, but only to voluntary firing: *Held*, therefore, that one who sets fire to woods by necessity, need not take "effectual care," nor *any* care, to extinguish it, so far as regards the penalty inflicted by those statutes—though he may be liable to an action on the case for the damages actually sustained by another. 60.